2006

Neldon Paul Johnson v. Ina Marie Johnson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NELDON PAUL JOHNSON, Appellant/Respondent, INA MARIE JOHNSON, Appellee/Petitioner.	Trial Court Judge: Fred Howard Trial Court No. 004401468 Appellate Court No. 20060290 Priority 15

BRIEF OF APPELLEE

ON APPEAL FROM THE FOURTH DISTRICT COURT

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STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

1. The Appellant presented eleven issues for review, but failed to state which issues were associated with the twelve orders and rulings he sought to appeal. Ina Johnson asserts that none of the Appellant's eleven issues are properly before the Utah Court of Appeals, because the Utah Court of Appeals lacks jurisdiction to issue rulings in this matter.

2. Ina Johnson believes that the Appellant failed to marshal the proper evidence to support the eleven issues set forth in his Brief, especially in regard to jurisdictional issues. The eleven issues presented in the Appellant's Brief were never specifically connected with a specific final order, which had been timely appealed. Thus, Neldon Johnson failed to properly marshal the evidence.

3. The trial court's rulings regarding the division of marital property is reviewed by the appellate court under an abuse of discretion standard. Shepherd v. Shepherd, 876 P.2d 429, 233. (Utah 1994) See also, In Whitehead v. Whitehead, 836 P.2d 814,816 (Ut. Ct. App. 1992) and In Hansen v. Hansen, 736 P.2d 1055, 1056, (Ut. Ct. App. 1987).

STATEMENT OF JURISDICTION

Pursuant to Rule 4(b) of the Utah Rules of Appellate Procedure, a Notice of Appeal must be filed within 30 days of a final judgment. In this case, six of the Orders being appealed were issued on February 7, 2006 and the Notice of Appeal was not filed until March 23, 2006. Therefore, the Utah Court of Appeals lacks jurisdiction to review those Orders numbered 1, 2, 3, 4, 5 and 6 in the Notice of Appeal. (R. 1812-1814)

One Ruling being appealed (Notice of Appeal, #12, R. 1813), was the subject of prior appeal and ruling. (R. 1308, 1307) The Notice of Appeal filed March 23, 2006 set forth that the date of the Ruling was issued by Judge Gary Stott on December 5, 2003. The Utah Court of Appeals lacks jurisdiction to hear such an appeal, because the Notice of Appeal was file three years from the date of the Ruling and because it had already been appealed once.

There are six other "Rulings" being appealed. Only one of the six is even an Order, even though the Notice of Appeal filed by Neldon Johnson claimed that the documents were orders. Neither the rulings, nor the one "Order and Ruling", which were timely appealed are final Orders. The one Order, that is also a Ruling, is an Order regarding an objection to the July 28, 2003 Order

issued by Judge Laycock, that was never appealed.

STATUTORY AND CONSTITUTIONAL PROVISIONS

There are no constitutional provisions relevant to this appeal. The statutory provisions relevant to this Appeal are: Utah Code Ann. § 30-3-5(3) and, Utah Code Ann. § 78-2a-3(2)(h). Additionally Rule 4(b) of the Utah Rules of Appellate Procedure applies, as well as Rule 33 and Rule 34 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE

The parties appeared before Judge James Taylor on May 29, 2001 and a stipulation was read into the record in open court. (R. 0326)

The parties were divorced on June 6, 2001 (R. 309-120).

On June 27, 2001, an Amended Decree was subsequently entered that set forth the terms of the stipulation placed on the record in open court on May 29, 2001. (R. 0326-0319)

On June 27, 2001 Amended Findings of Fact and Conclusions of Law were entered in this matter. (R. 0318-0311)

Paragraph 3A of the Amended Decree of Divorce awarded Ina Johnson the real property and surrounding acreage located at 5629 West 6400 North, American Fork Utah. (R. 0325)

Paragraph 3B awarded Ina Johnson the real property and surrounding acreage located at 512 South 860 East, American Fork, Utah 84003. (R. 0324)

Following the June 21, 2001 entry of the Amended Decree and Findings in this matter, Ina Johnson has been an ongoing and unsuccessful litigation, to enforce the terms of the Decree of Divorce in this matter.

On March 7, 2003 a hearing was held before Commissioner Thomas Patton. (R. 0946) One of the issues before the Court was Neldon Johnson's refusal to sign Quit Claim Deeds to the real property awarded to Ina Johnson. (R. 1145)

Neldon Johnson subsequently objected to the Recommendations of Commissioner Thomas Patton. The Objections of Neldon Johnson, regarding the issue of the Trust Deed and Trust Deed Note, along with his other objections to Commissioner Thomas Patton's Recommendations were set for rehearing and oral arguments before Judge Claudia Laycock on July 28, 2003.(R. 1158, 1157)

On July 28, 2003, Judge Claudia Laycock issued and signed an Order on Order To Show Cause, that reaffirmed the Recommendations of Commissioner Thomas Patton. (R. 1138-1146) On July 30, 2006, a Notice of Entry of Order on Order to Show Cause was filed with the Court. (R. 1159, 1160)

The Order on Order to Show Cause, signed by Judge Claudia Laycock on July 28, 2003 was never appealed by either party.

The Orders set forth in the Order on Order to Show Cause, which was signed by the Court on July 28, 2003, dealt with the rejection by the Court of the Trust Deed and Trust Deed note, as originally drafted by Neldon Johnson.

The transcript of the July 28, 2003 hearing (R. 1823, pages 44-49) sets forth the reasons for the drafting of a New Trust Deed and Trust Deed Note. It contains the directions given, on the record, by Judge Claudia Laycock, regarding the drafting of the new Trust Deed and Trust Deed Note, by the Petitioner. The resulting order was never appealed, although Neldon Johnson has been filing Objections ever since July 28, 2003.

The Order on Order to Show Cause, which was signed by Judge Laycock on July 28, 2003 sets forth the reasons the court rejected the Trust Deed and Trust Deed Note that was originally drafted by Neldon Johnson. The order also deals with the issues of real property and the Quit Claim Deeds. The Order also deals with the "one-action rule" as brought before the court by Neldon Johnson.

The July 28, 2003 Order on Order to Show Cause, (R. 1140) at paragraph 18 also found that "the Petitioner has the right to seek judgments and contempt citations, as she may need to do" [in order to enforce the terms of the Decree of Divorce.]

Paragraph 11 of the July 28, 2003 Order on Order To Show Cause states "The Court finds that Neldon Johnson has crafted a

Trust Deed Note and Trust Deed which were intended to amend the Decree of Divorce and intended to unilaterally, by execution of the Trust Deed and Trust Deed Note, alter the terms of the Decree of Divorce."

Paragraph 12 of the July 28, 2003 Order on Order to Show Cause states "The Court finds that the parties' file, which is now four volumes thick, is replete with instances of the Court's having found that Neldon Johnson has difficulty obeying the orders of the Court."

The July 28, 2003 Order was never appealed to the Utah Court of Appeals by Neldon Johnson. However, since July 28, 2003 hearing and subsequent Order, Neldon Johnson has filed numerous objections to the Order, which he failed to appeal. It is Mr. Johnson's objections to the July 28, 2004 Order (that was never appealed) that is the subject of many of the issues in this instant appeal.

Neldon Johnson filed a Motion to Disqualify Judge Claudia Laycock. Following the review of the Motion, Judge Gary Stott issued a Ruling on December 5, 2003. (R. 1282-1285)

Neldon Johnson then filed his first Notice of Appeal, regarding the December 5, 2005 Ruling. (R. 1288-1289) The Utah Court of Appeals issued a Memorandum Decision on July 22, 2004. (R. 1307, 1308) The Appeal was dismissed, because the December 5, 2003 Ruling of Judge Gary Stott was not a final, appealable

Order.

Neldon Johnson subsequently has now filed a second Notice of Appeal, regarding the December 5, 2005 Ruling on March 23, 2006. (Notice of Appeal, paragraph 12. R. 1813), regarding an issue which has been previously addressed by the Utah Court of Appeals.

Neldon Johnson filed a Notice of Appeal on March 23, 2006, regarding six separate orders which were signed by the Court on February 7, 2006. Because the Notice of Appeal was not filed within thirty days of the February 7,2 006 Orders, the Notice of Appeal was not timely filed.

See Notice of Appeal, paragraphs 2, 3, 4, 5, and 6, which are all orders signed by Judge Howard on February 7, 2006. Paragraph 1 of the appeal appeals a Ruling that does not exist in the file.

Item number 7 (seven) on The Notice of Appeal, filed March 23, 2006, appears to file a notice of appeal on an"Order on Ruling Re: Petitioner's Objection to Notice to Submit in Re: Respondent's Motion to Set Aside Decree of Divorce" which was signed by Judge Howard on February 23, 2006. (R. 1813) However, the Notice of Appeal is incorrect. The document is only a Ruling and not a final Order, the contents of which advise Neldon Johnson that the Court previously issued rulings on his motion. (R. 1729)

The actual final Order that denied the Motion of Neldon

Johnson to set aside the Decree of Divorce was signed by the Court on February 7, 2006, and never timely appealed.

Item number 8 on the Notice of Appeal is entitled "Order on Ruling and Order Re: Respondent's Objection to newly Prepared Trust Deed Note and Trust Deed" which was signed by Judge Howard on February 23, 2006. The Order is merely a reaffirmation of prior orders, which ordered Neldon Johnson to "sign the newly prepared trust deed note and trust deed and return them to Petitioner's counsel within ten days of the date and Ruling of this Order." (R. 1732) Therefore, it is not a final Order.

However, Neldon Johnson had long ago been given the same orders by Judge Claudia Laycock, when he was ordered to sign the Trust Deed and Trust Deed Note within six weeks of July 28, 2003. (R. 1141, paragraph 17)

Item number 9, on the Notice to Appeal is entitled "Order on Ruling Re: Order to Show Cause" which was signed by the court on February 23, 2006." This document is not an Order, but a ruling which was signed on February 23, 2006, which is actually titled: "Ruling Re: Order to Show Cause." The Ruling is an additional explanation to Neldon Johnson regarding the history of this case and general case law that applies to Neldon Johnson. The Ruling advises what the court intends to do in the future. However, it is not a final Order. (R. 1736-1741)

Neldon Johnson did not file a Notice of Appeal regarding the

"Order, In Re: January 23, 2006 Hearing" (R. 1758-1761), although he did discuss it in his Brief. However the "Order, in Re: January 23, 2006 Hearing," is not listed as any of the 12 orders and rulings placed for appeal before the Utah Court of Appeals by Neldon Johnson.

Item number 10 in the Notice of Appeal is entitled "Order on Ruling: Respondent's Objection to Order regarding the January 23, 2006 Hearing", which was signed by the Court on January 27, 2006.(R. 1751, 1752, 1753)

Item number 10 is not an Order, but another ruling, The correct title of the document is "Ruling Re: Respondent's Objection to Order Regarding the January 23, 2006 Hearing". This document was signed by the trial court on February 27, 2006. In that document, the Court overruled the Objections of Neldon Johnson to the Order Regarding January 23, 2006 Hearing and indicated that it would sign the Order as submitted. The Ruling is not a final Order, but a Ruling on an Objection. The final Order that the Objection deals with was never appealed by Neldon Johnson.

Item 11 in the Notice of Appeal is entitled "Ruling Re: Affidavit of Attorney's Fees" signed February 27, 2006. (R. 1754-1757) Again, this is the appeal of a Ruling regarding Neldon Johnson's objection to the "Order, in Re; January 23, 2006 Hearing," as it applied to the issue of attorney's fees. Neldon

Johnson did not file an Appeal of the final Order which the Ruling addresses.

Item 12, in the Notice of Appeal is an appeal regarding a Ruling made by Judge Stott on December 5, 2005. The Notice of Appeal was not timely and had been previously appealed to the Utah Court of Appeals.

SUMMARY OF APPELLEE'S ARGUMENT

In addressing the 12 Orders, or Rulings, that were presented by Neldon Johnson for appeal, Neldon Johnson has failed to file a timely Notice of Appeal six of the Orders. The remaining six issues presented by Neldon Johnson were not final, appealable orders, but represented continued objections and rulings to orders that were issued in 2003 and had never been appealed.

One Ruling that Neldon Johnson appeals was already the subject of a prior appeal by Neldon Johnson. (See Notice of Appeal, paragraph 12). Neldon Johnson cannot appeal the December 5, 2005 Ruling of Judge Stott, three years after the Court of Appeals already issued a Memorandum Decision on the first Ruling. In addition, even if Neldon Johnson had not already filed and litigated the issue three years ago, the Notice of Appeal was well past the 30 day deadline, set forth in Rule 4(b) of the Utah Rules of Appellate Procedure.

Additionally, Appellee asserts that Neldon Johnson has failed to Marshall the evidence and his numerous appeals also fail for that reason. They would have failed, even if he had filed on time and they would have failed even if he had filed an appeal on a final order, because he has failed to marshal evidence in this case.

Neldon Johnson set forth in his Brief that the Standard of Review, in this matter is that of a question of law. The actual standard of Review is abuse of discretion.

Pursuant to Rule 33, as well as 34 of the Utah Rules of Appellate Procedure, Ina Johnson should be awarded her fees and costs, and they should be assessed against both Ina Johnson and her attorney. Both Neldon Johnson and his attorney were well aware of the requirements for appeal in this case, because an appeal had been taken before. Even the most inexperienced attorney, (which Denver Snuffer is not) would know that what time requirements are set forth in Rule 4(b) of the Utah Rules of Appellate Procedure. Assuming that Rule 4(b) was known to both Neldon Johnson and his counsel, due to the prior Ruling of the Utah Court of Appeals in this matter, (R. 1307, 1308) then the sole purpose of this appeal was to delay and obstruct the rights of Ina Johnson, to enforce the terms of the Decree of Divorce.

ARGUMENT

APPELLANT FAILED TO MARSHALL EVIDENCE TO ESTABLISH THAT THE LOWER COURT ABUSED IT'S DISCRETION IN ISSUING ANY OF THE ORDERS, OR RULINGS, AND THE APPELLANT FAILED TO MARSHAL ANY EVIDENCE THAT HE TIMELY FILED HIS APPEALS ON FIVE OF THE ORDERS

A. NELDON JOHNSON FAILED TO FILE A TIMELY NOTICE OF APPEAL ON SIX OF THE ORDERS

On March 23, 2006, Neldon Johnson filed a Notice of Appeal regarding 12 Orders, or Rulings. Five Orders were signed and entered by the trial court on February 7, 2006. (R. 1813, 1814) Those orders are as follows;

1) In the Notice of Appeals, Neldon Johnson appeals a document he entitled "Order on Ruling Re: Respondent's Objection to Order on Objections to Trust Deed and Trust Deed Note Prepared by Petitioner" No such order exists. There is Ruling in the court file entitled "Ruling Re: Respondent's Objection to Order on Objections to Trust Deed and Trust Deed Note Prepared by Petitioner; Objection to Order Denying Motion to Set Aside Decree of Divorce; Objection to Order Regarding Objection to Community Service; Objection to Order On Objection to Order To Show Cause; and Objection to Order Denying Objection to Prior Order of Attorney's Fees" R. 1687-12693. However, that Ruling was never

the subject of the appeal and was not a final order.

2) Order on Objections to Trust Deed and Trust Deed Note Drafted by Petitioner, signed by the Court on February 7, 2006. A Notice of Appeal filed March 23, 2006, in an untimely manner.

3) Order Denying Motion to Set Aside Decree of Divorce, signed by the Court on February 7, 2006. A Notice of Appeal was filed March 23, 2006, in an untimely manner.

4) Order Regarding Objection to Community Service, signed by the Court on February 7, 2006. Notice of Appeal filed March 23, 2006. A Notice of Appeal was filed March 23, 2006, in an untimely manner.

5)Order on Objection to Order on Order to Show Cause, signed by the Court on February 7, 2006. Notice of Appeal filed March 23, 2006, in an untimely manner.

6) Order denying Objection to Prior Order of Attorney's Fees, signed by the Court on February 7, 2006. A Notice of Appeal filed March 23, 2006, in an untimely manner.

Neldon Johnson failed to marshal any evidence, or present any arguments, that would allow him to file the Notice of Appeal two weeks late. Pursuant to Rule 4(b) of the Utah Rules of Appellate Procedure, the Notice of Appeal must be filed "within 30 days" of a final judgment." Pursuant to Gillett v. Price, 135 P.3d 862, 863, 861, (2006):

"There are times when some timely filed postjudgment motions will toll the thirty-day period until the district court enters an

order regarding that motion. The motions that toll the time for appeal under rule 4(b) include (1) a motion for judgment notwithstanding the verdict under rule 50(b) of the Utah Rules of Civil Procedure, (2) a motion to amend or make additional findings of fact under Rule 52(b) of the Utah Rules of Civil Procedure, and (3) a motion to amend for a new trial under rule 59 of the Utah Rules of Civil Procedure. Not included within the 4(b) exceptions, however, is a postjudgment motion to reconsider. Id. In fact, postjudgment motions to reconsider are not recognized anywhere in Utah Rules of Appellate procedure or the Utah Rules of Civil Procedure.

Neldon Johnson filed several Motions for Reconsideration in this matter, but they did not toll the time regarding the 30 day rule. Even if they had, Neldon Johnson would have had to marshal all evidence to show that the time had been tolled. Mr. Johnson failed to even address the issue in that regard, but chose instead to ignore the fact that he did not file a timely Notice of Appeal.

Thus, the Utah Court of Appeals lacks jurisdiction to hear the issues set forth in the first six Orders as set forth above.

Neldon Johnson sets forth eleven issues, (Brief pages 1-5) which he presented for appeal. However, Mr. Johnson failed to relate any of his eleven issues to a specific final, appealable Order, for which the Notice of Appeal was timely filed.

The Rulings to which issues are connected are not final orders. It is impossible to deal with Appellant's Brief because Mr. Johnson failed to marshal the evidence, setting forth which issues were connected to a final, appealable Order which had been timely appealed. Rule 24(a)(9) of the Utah Rules of Appellate

Procedure provided in material part, "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding" (2006) The Court of Appeals set forth the marshaling requirement in Oneida/SLC v. Oneida Cold Storage & Warehouse, 872 P.2d 1052, 1052 (Utah App 1994):

> Utah appellate courts do not take trial court's factual findings lightly. We repeatedly have set forth the heave burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devils advocate. "[Attorneys must extricate "themselves] from the client's shoes and fully assume the adversary's position. In o4rder to properly discharge the [marshaling] duty.....the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists... Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them "clearly erroneous." (Emphasis in original)

Neldon Johnson claims that the Stipulated Amended Decree of Divorce is not enforceable. However, he failed to marshal any evidence as to whether the Utah Court of Appeals had jurisdiction over the Order Denying Motion to Set Aside Decree of Divorce that was signed and entered by the Court on February 7, 2006. The Notice of Appeal, on the Order was filed on March 23, 2006 and was not timely.

Neldon Johnson takes issue, at several places in his Brief with the proceedings and discussions at the July 28, 2003 hearing. A final Order was issued from that hearing, which was

never the subject of an appeal. (R. 1138-1146)

Neldon Johnson's "issues" as set forth in his Brief, at pages 1 though through 5, addresses issues which were heard at the July 28, 2003 hearing. The Order from that hearing was never appealed. Yet, Neldon Johnson sets forth arguments at page 17 of his Brief, line 2 that at the July 28, 2003 hearing held by judge Claudia Laycock, "The district court judge refused to receive and consider evidence regarding the original written stipulation of the parties that would have clarified ambiguity."

The hearing of July 28, 2003 resulted in an Order on Order to Show Cause, signed by Judge Claudia Laycock on July 28, 2003. (R. 1138-1146) The Order was never appealed by Neldon Johnson.

In addition, the Order Denying Objection to Prior Order of Attorney's Fees, which was signed by the Court on February 6, 2006, related back to the July 28, 2003 hearing. However, that is one of the Orders which Neldon Johnson failed to timely appeal. (R. 1715-1717)

Neldon Johnson's second Argument is in regard to issue of contempt. Although Mr. Johnson argues case law and constitutional issues, he fails to cite which final Order, where the Notice of Appeal was timely filed, deals with the issue of a contempt citation issued to Neldon Johnson. He fails to marshal any evidence in the record, that would allow him to address the issue of contempt that is set forth in a final Order. Neldon Johnson

does cite to the court record, pages 1738-1739, regarding a "Ruling Re: Order to Show Cause", which is Item number nine, in the Notice of Appeal. Even if the "Ruling Re: Order to Show Cause" was an actual final order (which it is not), the analysis of Neldon Johnson regarding contempt is not even properly placed before the Court because the Ruling does not hold Neldon Johnson in contempt, but simply states "Such issues have been ruled on and the Orders have since been signed by the Court." (R. 1738, lines 14 and 15). The argument of Neldon Johnson appears to be that he believes he cannot be held in contempt. However, he failed to state where he was held in contempt, when he was held in contempt and the Order that he appeals.

However, the Ruling is not an order, and only addresses inquiries of Neldon Johnson regarding Order that were previously issued and never appealed by Neldon Johnson.

The one-action rule was discussed by Neldon Johnson and he cited to the court record at pages 1758-1761. However pages 1758-1761 is the court record for "Order, in Re; January 23, 2006 Hearing." That order has never been appealed by Neldon Johnson.

The July 28, 2003, Order on Order to Show Cause, at paragraph 18 addressed the "one-action rule." As previously noted, that order was never the subject of an appeal. (R. 1141)

Had Neldon Johnson timely filed a Notice of Appeal on the six Orders that were issued by the Court on February 7, 2006,

then he also would have been required to address the standard of review for the final Orders. Mr. Johnson's Brief set forth his contention that the issues he presented were those of Interpretations of terms of a contract and thus are a question of law.

If the issues before the Court of Appeals were just questions of law, then there are two issues missed by Mr. Johnson. The first is that the first six orders are not properly before the Utah Court of Appeal because Mr. Johnson failed to file the Notice of Appeal in a timely manner.

The second is that Mr. Johnson cannot appeal anything, except a final order. The "Rulings" which Mr. Johnson seeks to appeal are not final orders.

The standard of review in the Orders (that were not timely appealed) would have been "abuse of discretion." In Whitehead v. Whitehead, 836 P.2d 814,816 (Ut. Ct. App. 1992), the Utah Court of Appeals held that "trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence."

In Hansen v. Hansen, 736 P.2d 1055, 1056, (Ut. Ct. App. 1987) the Utah Court of Appeals held that: "where the trial court may exercise broad discretion, we presume the correctness of the court's decision, absent 'manifest injustice or inequity that indicates a clear abuse of discretion.'"

Neldon Johnson appeals the order of attorney's fees, regarding the hearing held January 23, 2006. However, the attorney's fees awarded for the January 23, 2006 hearing were issued in the "Order, in Re: January 23, 2006 Hearing," at paragraph 5, which was signed by the trial court on February 27, 2006. Neldon Johnson failed to file a Notice of Appeal on the January 27, 2006 Order entitled "Order, in Re: January 23, 2006 Hearing." See Notice of Appeal, items 1 through 12. (R. 1812-1814)

Neldon Johnson failed to marshal any evidence which would support his obvious contention that he is able to appeal orders which were not the subject of a timely Notice of Appeal.

Neldon Johnson failed to marshal any evidence that the award of attorney's fees was an abuse of discretion, even if he had filed an appeal regarding the order.

An award of attorney's fees by the trial court should be reviewed for an abuse of discretion, "Because the award of fees is.... in the sound discretion of the trial court." Wiley v. Wiley, 951 P.2d 226, 230 (Utah 1997), (quoting Dixie State Bank v. Bracken, 764 P.2d 985, 988, (Utah 1988))

B. RULING AND ORDER RE: RESPONDENT'S OBJECTION TO NEWLY PREPARED TRUST DEED AND TRUST DEED NOTE SIGNED BY THE COURT ON FEBRUARY 23, 2006 IS NOT A FINAL ORDER AND APPELLANT FAILED TO MARSHAL EVIDENCE

Neldon Johnson filed a Notice of Appeal on "Ruling and Order

Re: Respondent's Objection to Newly Prepared Trust Deed Note and Trust Deed," which was signed by the Court on February 23, 2006. (R. 1731-1735) See the Notice to Appeal, item number 8.

The Notice of Appeal, at item #8, Neldon Johnson called the document an "Order and Ruling and Order Re: Respondent's Objection to Newly Prepared Trust Deed Note and Trust Deed."

Neldon Johnson failed to marshal any evidence, in regard to his appeal of the "Order on Ruling Re: Respondent's Objection to Newly Prepared Trust deed Note and Trust Deed" that supported his contention that the Order and Ruling actually is a final order, which

"A party challenging a fact finding must first marshal all record evidence that supports the challenged finding" (2006) The Court of Appeals set forth the marshaling requirement in Oneida/SLC v. Oneida Cold Storage & Warehouse, 872 P.2d 1052, 1052 (Utah App 1994).

Neldon Johnson's Brief contains a Summary of Arguments section, at pages 12, 13 and 14. At page 13, the first paragraph, there is some discussion of each parties claims, regarding the Trust Deeds, but Mr. Johnson does not marshal any evidence what-so-ever.

The Ruling and Order, sets forth specific findings regarding Neldon Johnson's objections at specific paragraphs of the Trust Deed Note. (R. 1733, last paragraph). Neldon Johnson failed to

marshal any evidence to challenge the court's findings when it held that Neldon Johnson's objection to:

"the last sentence of paragraph three (3) of the Trust Deed Note is untimely. Furthermore the Court finds that Respondent's argument regarding acceleration in the event of prepayment is not compelling. Because Respondent is not required to prepay the indebtedness to Petitioner, any alleged acceleration that may occur in the event of prepayment can easily be avoided by Respondent. The Court also finds that Respondent's numerous objections to the Trust Deed were waived when Respondent failed to make specific objection to the Trust Deed at the July 28, 2003 hearing. The Court therefore overrules Respondent's untimely objections." (R. 1732, 1733).

In order to ask the Utah Court of Appeal to overturn the Order, Neldon Johnson was required to address the findings set forth by Judge Howard, that Neldon Johnson's objections were untimely. Neldon Johnson failed to marshal any evidence, failed to cite to the transcript that Judge Howard referred to, in order to issue the Order, and failed to rebut the findings of the Court in any way or manner.

The Court found, in the Order, that the objections of Neldon Johnson to the Trust Deed and Trust Deed Note were not presented to the Court in a timely manner. Mr. Johnson's Brief failed to address the initial Order issued by the Court, on July 28, 2003, regarding the Trust Deed. He failed to address the fact that Judge Howard's Ruling and Order found that Judge Howard had reviewed the full transcript of the July 28, 2003 hearing and found that Neldon Johnson's objections were untimely. No evidence was marshaled to address the findings of Judge Howard.

Neldon Johnson failed to marshal evidence that his

objections were timely and failed to marshal any evidence that the findings and Order of Judge Howard are in error, or constitute an abuse of discretion.

Neldon Johnson's Brief does not mention the issue of abuse of discretion. In Hansen v. Hansen, 736 P.2d 1055, 1056, (Ut. Ct. App. 1987) the Utah Court of Appeals held that: "where the trial court may exercise broad discretion, we presume the correctness of the court's decision, absent 'manifest injustice or inequity that indicates a clear abuse of discretion.'"

The Order finds that (R. 1734, line 13-16) that "The hearing transcript reveals that Respondent did not initially assert any objection to the Trust Deed. When Asked twice by the Court whether he had an objection to the Trust Deed, Respondent claimed that he only objected to the Trust Deed Note and not to the Trust Deed."

When discussing findings, Judge Howard examined the transcript of the July 28, 2003 hearing before Judge Laycock. The Court record, page 1823 is the transcript of that hearing. Page 25 of the transcript, lines 16-19 state as follows:

"The Judge: Okay. So, the trust deed is okay? It's only the trust deed note that bothers you?

Mr. Woolley: [Neldon Johnson's attorney] That's correct, your Honor.

The Judge: Okay."

An examination of the transcript of the July 28, 2003

hearing deals exclusively with the Objections of Neldon Johnson to the Trust Deed and Trust Deed note. (R. 1823, at pages 44 through 49) The transcript is clear that once Judge Laycock provided specific directions regarding the fact that the Court ordered Trust Deed and Trust Deed Notes to be amended, and after the Court heard extensive arguments regarding the Trust Deed and Trust Deed Note, that Neldon Johnson stated, on the record, (R. 1823, transcript page 49, line 3) "I won't sign it."

Neldon Johnson never addressed what code or statute allowed him to ask Judge Howard to overrule an order Judge Laycock had made three years earlier. That information was never marshaled by Mr. Johnson.

In fact, Neldon Johnson never has signed the Trust Deed Note and Trust Deed as ordered by the Court in 2003. Mr. Johnson never signed the Trust Deed, as ordered by Judge Howard in February of 2006. See "Verified Notice of Respondent's Willful Refusal to Sign Trust Deed Note as Required in the Court's Ruling Dated February 23, 2006 and Verified Motion for Order of Contempt". In that document, Ina Johnson informs the Court that Neldon Johnson refused to follow the Court's direction to sign the Trust Deed and Trust Deed Note. The Verified Notice was filed with the court on March 13, 2006, ten days prior to the date of the Notice of Appeal, in this matter. Neldon Johnson has refused, over the past three years, to follow any directions or orders of the Court. When pressed to follow orders, Mr. Johnson filed an untimely

Notice of Appeal or appeals Rulings that are not final orders. The actions are an abuse of the Appellate system.

Neldon Johnson failed to marshal any evidence that the February 23, 2006 Ruling and Order was a final Order. The final order in this matter had already been issued by Judge Laycock on July 28, 2003 and was never appealed.

The Order on Objection did not result in a new, final order. In order "for an order or judgment to be final, it must 'dispose of the subject-matter of the litigation on the merits of the case'". Kennedy v. New era Indus, Inc.,, 600 P.2d 534,536 (Utah 1979).

Neldon Johnson's objections to the Trust deed and Trust Deed Note Drafted by Petitioner, was signed by the Court on February 7, 2006. That order was not timely appealed. (R. 1694-1703)

The fact that Neldon Johnson made new and "more improved Objections" do not create a "new, more improved final Order."

C. NELDON JOHNSON FILED A NOTICE OF APPEAL ON RULINGS THAT WERE NOT FINAL ORDERS OF THE TRIAL COURT

On March 23, 2006, Neldon Johnson filed a Notice of Appeal regarding several Rulings.

Pursuant to Rule 4(b) of the Utah Rules of Appellate Procedure, the Notice of Appeal must be filed "within 30 days" of a final judgment."

Item 12, on the Notice of Appeal sets forth an appeal on an Order on Ruling by the Honorable Judge Stott, signed December 5, 2003. The Order on Ruling signed by Judge Stott is over three years old and was not timely filed pursuant to Rule 4, of the Utah Rules of Appellate Procedure. It is also a final judgment.

However, not only is this Appeal not timely, it was also appealed in 2003, by Neldon Johnson. In that first appeal, the matter was dismissed for lack of jurisdiction because Neldon Johnson had appealed an Order which was not a final judgment. (R. 1307, 1308)

In that first decision, the Utah Court of Appeals held that, "an appeal of right may be taken only from a final judgment that 'ends the controversy between the parties litigant.'"

The Utah Court of Appeals held that, "The order that the Appellant seeks to appeal is not a final judgment because it does not fully dispose of the case." (R. 1308)

The most outrageous of the issues set for appeal by Neldon Johnson is the one that was already ruled upon by the Utah Court of Appeals three years ago.

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, Ina Johnson herein requests an award of damages for delay or frivolous appeal and requests an award of her attorney's fees. Pursuant to Rule 33(a) the damages may be paid by the party or, the party's attorney.

Pursuant to Rule 33(c)(1), Ina Johnson is permitted to move

for an award of damages in her responsive Brief. Pursuant to Rule 33(a) the damages may be single or double costs, as set forth in Rule 34 and/or reasonable attorney's fees.

Pursuant to Rule 33, of the Utah Rules of Civil Procedure, Ina Johnson should be granted her attorney's fees and double her costs, if it is determined that the Appeal in this matter is frivolous, or intended to delay. Rule 33(a) provides in part: "If the court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney fees, to the prevailing party." The case of Fife v. Fife,777 P.2d 512 (1989) also supports such an award.

In his Notice of Appeal, at item number 9, Neldon Johnson filed an appeal on a document he entitled, "Order on Ruling Re: Order to Show Cause signed February 23, 2006. (R. 1736-1741).

The Notice of Appeal calls the document an "Order" but that is not supported by an examination of the document. The actual document, signed on February 23, 2006, is entitled "Ruling Re: Order to Show Cause". (R. 1741) This document is not a final order.

The Ruling at page 2, discusses the issues of the transfer of land pursuant to the Decree of Divorce. (R. 1740) The Ruling discusses that the property settlement in this case was made "in lieu of alimony." (R. at 1739) However, after much discussion, regarding property and the issue of contempt as well as the

discussion of constitutional issues, the Ruling states; "the question of Respondent's ability to perform is a question of fact that the Court will need to resolve at an evidentiary hearing. Therefore, the Court will send notice of a telephone scheduling conference to address the question of the purported need for limited discovery between the parties and to set a time for an evidentiary hearing." (R. 1737, 1738).

The Ruling is not a final judgment because it does not fully dispose of the case. See Kenney v. New Era Indus., Inc., 600 P.2d 534, 536 (Utah 1979) Neldon Johnson did not even address the issue of finality and failed to marshal any evidence that the Ruling was final. The document states, on it's face, that it is not final when it calls for an additional hearing on the issues discussed in the Ruling. At best, it is advisory to the parties, regarding procedure and the trial court's opinion of case law.

In the Notice of Appeal, item number 10, is an appeal of a document Neldon Johnson entitled "Order on Ruling Re; Respondent's Objection to Order Regarding the January 23, 2006 Hearing." Respondent states the Ruling was signed on February 27, 2006. There is no document in the court file with such a title. There is a document entitled "Ruling on Objection to Order Regarding the January 23, 2006 Hearing," that was signed by Judge Howard on February 27, 2006.

Neldon Johnson discusses the issue of attorney's fees contained in the "Order, In Re: January 23, 2006 Hearing", which

was signed by the Court on February 27, 2006. (R. 1758-1761) The Order Mr. Johnson refers to (Order, In Re: January 23, 2006 Hearing) was never appealed by Neldon Johnson and is not set forth as an Order which has been appealed in the Notice of Appeal, filed March 23, 2006.

Neldon Johnson objected to the Order, and the Court issued a Ruling on his Objection. (R. 1751-1753) However, the issues set forth in the Ruling are not final orders.

In the Ruling, Judge Howard states that "The Court respectfully overrules Respondent's Objection to Order Regarding the January 23, 2006 Hearing and will sign the Order as submitted." (R. 1752)

Even if the Ruling were a final Order, Neldon Johnson failed to marshal any evidence that would allow him to claim that the Ruling was anything more than the denial of an objection. He also failed to marshal any evidence that supported his dispute of the award of attorney's fees.

Neldon Johnson cannot discuss claims in an Order he failed to appeal. And, if he did, then he would have had to marshal the evidence that supports or refutes the findings of the trial court. Instead, the findings were totally ignored by Neldon Johnson. On Pages 30 and 31 of the Appellant's Brief, he acknowledges the findings of the Court, as to attorney's fees, but fails to marshal any evidence supporting his claims that the fees were inappropriate. Neldon Johnson claims that "nothing in

the district Court's ruling and Order sets forth why the attorney's fees award included charges from as far back as 2004 for items such as "preparing a case summary" and reviewing the file". However, Mr. Johnson fails state what charges were incurred in 2004 and failed to marshal any evidence that indicated how the charges failed to relate to the hearing. The "Order, In Re: January 23, 2006 Hearing" was never appealed, and therefore it may be a moot point that Neldon Johnson failed to marshal the evidence.

The Ruling, regarding an objection, even if granted, does not represent a final determination of an issue. (R. 1753) In order "for an order or judgment to be final, it must 'dispose of the subject-matter of the litigation on the merits of the case'". Kennedy v. New era Indus, Inc.,, 600 P.2d 534,536 (Utah 1979).

In the Notice of Appeal , at item number 11, the Respondent appeals the "Order on Ruling Re: Affidavit of Attorney's Fees", signed February 27, 2006.

The only document in the court file that was signed on February 27, 2006, that is close to the one mentioned by Neldon Johnson is a "Ruling Re: Affidavit of Attorney's Fees", which was signed by Judge Howard on February 27, 2006. (R. 1754-1757).

In the Notice of Appeal at item 11, Neldon Johnson appeals the "Order on Ruling Re: Affidavit of Attorney's Fees". However, he also cites to the Court record, at pages 1755-1757, which are the same pages as the Ruling, it is assumed that it is actually

the "Ruling Re: Affidavit of Attorney's Fees" which Mr. Johnson is appealing. It is only a Ruling however, and not an Order. It is not a final order in any case.

The Ruling addresses the findings of the Court. (R. 1756) The Court issued findings that included a discussion of the requirements for granting an award of attorney's fees and then stated that "The court notes that the legal services provided for Petitioner included reviewing the court file, conducting research, drafting documents, meetings with staff and the client and preparing for and attending court hearing." The Court addressed many other issues, including the history of this case, rates usually charged and the reasonableness of the charges. Neldon Johnson failed to marshal any evidence at all, regarding the findings issued in the Ruling.

Neldon Johnson failed to file an Appeal of the underlying Order, which actually granted the award of attorney's fees. The Ruling sets forth why the Order was issued. The Ruling is not the final order and did not dispose of the issue of attorney's fees.

In order "for an order or judgment to be final, it must 'dispose of the subject-matter of the litigation on the merits of the case'". Kennedy v. New era Indus, Inc., 600 P.2d 534,536 (Utah 1979).

CONCLUSION

The Utah Court of Appeals lacks jurisdiction to hear issues where the Notice of Appeal was not filed on a timely basis. The Utah Court of Appeals lacks jurisdiction to review an order which is not a final order and does resolve the issues on the merits. Ina Johnson should be granted a judgment for her attorney's fees and a judgment for double her costs.

Dated and signed this 29th day of January 2007.

Respectfully Submitted,

Rosemond Blakelock
Attorney for Appellee
75 South 300 West
Provo, Utah 84063

MAILING CERTIFICATE

On this 30 day of January, 2007, I mailed, via first class mail two true and correct coopies of the foregoing Brief of Appellee, to the following:

Denver Snuffer
Nelson, Snuffer, Dahle and Poulsen, P.C.
10885 South State Street
Sandy, Utah 84070

APPENDIX A
ORDERS AND RULING WHICH WAS SIGNED BY JUDGE HOWARD ON FEBRUARY 7, 2006 AND THE NOTICE OF APPEAL

Notice of Appeal, filed March 23, 2007

Ruling Re: Respondent's Objection to Order on Objections to Trust Deed and Trust Deed Note Prepared by Petitioner; Objection to Order Denying Motion to Set Aside Decree of Divorce; Objection to Order Regarding Objection to Community Service; Objection to Order On Objection to Order To Show Cause; and Objection to Order Denying Objection to Prior Order of Attorney's Fees
signed by the Court on February 7, 2007

Order on Objection to Trust deed and Trust Deed Note Drafted By Petitioner
signed by the court on February 7, 2006

Order Denying Motion to Set Aside Decree of Divorce
signed by the court on February 7, 2006

Order Regarding Objection to Community Service
signed by the court on February 7, 2006

Order on Objection to Order to Show Cause
signed by the court on February 7, 2006

Order Denying Objection to Prior Order of Attorney's Fees
signed by the court on February 7, 2006

Denver C. Snuffer, Jr. (3032)
NELSON, SNUFFER,
DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Fax: (801) 576-1960
Attorneys for Respondent

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON,

Petitioner,

vs.

NELDON PAUL JOHNSON,

Respondent.

NOTICE OF APPEAL

Civil No. 004401468

DIVISION# 1

Notice is hereby given that Respondent/Appellant Neldon Paul Johnson, through Denver C. Snuffer, Jr., of NELSON, SNUFFER, DAHLE & POULSEN, appeals to the Utah Court of Appeals the following final orders of the Honorable Judges Claudia Laycock and Fred D. Howard:

1. Order on Ruling Re: Respondent's Objection to Order on Objections to Trust Deed and Trust Deed Note Prepared by Petitioner signed February 7, 2006.

2. Order on Objections to Trust Deed and Trust Deed Note Drafted by Petitioner signed February 7, 2006.

3. Order Denying Motion to Set Aside Decree of Divorce signed February 7, 2006.

4. Order Regarding Objection to Community Service signed February 7, 2006.

5. Order on Objection to Order on Order to Show Cause signed February 7, 2006.

6. Order Denying Objection to Prior Order of Attorney's Fees signed February 7, 2006.

7. Order on Ruling Re: Petitioner's Objection to Notice to Submit in Re: Respondent's Motion to Set Aside Decree of Divorce signed February 23, 2006.

8. Order on Ruling and Order Re: Respondent's Objection to Newly Prepared Trust Deed Note and Trust Deed signed February 23, 2006.

9. Order on Ruling Re: Order to Show Cause signed February 23, 2006.

10. Order on Ruling Re: Respondent's Objection to Order Regarding the January 23, 2006 Hearing signed February 27, 2006.

11. Order on Ruling Re: Affidavit of Attorney's Fees signed February 27, 2006.

12. Order on Ruling by the Honorable Judge Stott signed December 5, 2003.

This Appeal is made by the above-named Respondent/Appellant who is represented by:

Denver C. Snuffer, Jr. (3032)
NELSON, SNUFFER,
DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Fax: (801) 576-1960
Attorneys for Respondent

The Petitioner/Appellee, Ina Marie Johnson (Bodell) is represented by:

Rosemond G. Blakelock
305 East 300 South
Provo, Utah 84606
Telephone (801) 375-7678
Facsimile (801) 375-0704

DATED this 23 day of March, 2006.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

Denver C. Snuffer, Jr.
Bret W. Reich
Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I sent a true and correct copy of the foregoing **Notice of Appeal,** via facsimile and first class mail, postage pre-paid, on the following:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601

on this 23 day of March, 2006.

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	**RULING RE: RESPONDENT'S OBJECTION TO ORDER ON OBJECTIONS TO TRUST DEED AND TRUST DEED NOTE PREPARED BY PETITIONER; OBJECTION TO ORDER DENYING MOTION TO SET ASIDE DECREE OF DIVORCE; OBJECTION TO ORDER REGARDING OBJECTION TO COMMUNITY SERVICE; OBJECTION TO ORDER ON OBJECTION TO ORDER ON ORDER TO SHOW CAUSE; and OBJECTION TO ORDER DENYING OBJECTION TO PRIOR ORDER OF ATTORNEY'S FEES** Case # 004401468 Judge Fred D. Howard Division 5

This matter comes before the Court on Respondent's following Objections: (1) *Objection to Order on Objections to Trust Deed and Trust Deed Note Drafted by Petitioner;* (2) *Objection to Order Denying Motion to Set Aside Decree of Divorce;* (3) *Objection to Order Regarding Objection to Community Service;* (4) *Objection to Order on Objection to Order on Order to Show Cause;* and (5) *Objection to Order Denying Objection to Prior Order of Attorney's Fees.* The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

The Court notes that a hearing was held before the Honorable Judge Claudia Laycock on July 28, 2003. At that hearing, Judge Laycock directed counsel for Petitioner to draft orders in accordance with the Court's rulings on a number of issues. On August 7, 2003, Respondent filed objections to each of the submitted orders. The Court has reviewed the hearing transcript, reviewed the language of the submitted orders, and will address each of Respondent's objections as follows:

Respondent's Objection to Order on Objections to Trust Deed and Trust Deed Note Drafted by Petitioner

The Court notes that Respondent has objected to the paragraphs numbered 5, 9, and 13. First, Respondent asserts that by and through his counsel, he objected to the Trust Deed in its entirety. Second, Respondent asserts that the Court found that the intent of the parties was to specifically not allow acceleration of the payments as discussed in the Amended Decree. Third, Respondent asserts that the Court did not find that "no objection was made" but rather that no *specific* objection was made to the Trust Deed.

The Court is unpersuaded by Respondent's characterization of the Court's ruling. As to Respondent's first and third objections, the Court notes that Judge Laycock made the following statement during her ruling: "There was no objection made in writing to the trust deed itself, and no objection made today until after I'd asked the question twice." A review of the hearing transcript reveals that Respondent did not initially assert an objection to the Trust Deed.

When asked twice by the Court whether he had an objection to the Trust Deed, Respondent claimed that he only objected to the Trust Deed Note and not to the Trust Deed. When Respondent apparently changed his position as to the Trust Deed, he was not able to articulate any specific objections to the document and therefore made a generalized objection to the Trust Deed in its entirety. It is clear from the record that Judge Laycock determined, given Respondent's previous waiver of an objection and lack of a specificity, that no objection was made. The order submitted by Petitioner is therefore accurate and paragraphs 5 and 13 will remain as written.

As to Respondent's second objection, the Court finds that the order submitted by Petitioner is an accurate representation of the Court's ruling. Judge Laycock struck the acceleration clause paragraph of the Trust Deed Note because it conflicted with the amended decree of divorce. However, just as the submitted order sets forth, Judge Laycock found that the parties intended to leave the issue of untimely payments to be resolved by the Court on an Order to Show Cause basis. Based on the Court's review of the record and the above analysis, the Court will sign the Order on Objections to Trust Deed and Trust Deed Note Drafted by Petitioner as it was originally submitted.

Respondent's Objection to Order Denying Motion to Set Aside Decree of Divorce

The Court notes that Respondent has objected to the paragraphs numbered 2, 3, 4, 5, 7, 8 and 9. Respondent asserts that the statement in the Order that the Court found "that the language is clear and unambiguous" is incorrect. Respondent generally objects to the Court's reasoning and argues that the Amended Decree is patently ambiguous and should be set aside for the benefit of all parties. Respondent argues that, in the alternative, the Court should set an evidentiary hearing to determine the intentions of the parties concerning the land.

The Court finds that Petitioner's submitted Order is an accurate reflection of the Court's ruling. While Respondent may disagree with the substance of the Court's ruling, Judge Laycock specifically stated that the language of the Amended Decree was clear and unambiguous. The remainder of Respondent's objections do not address the form of the submitted Order, but rather the substance of the Ruling. In effect, the objections are tantamount to a Motion to Reconsider, which is not a proper motion before this Court. Therefore, the Court overrules Respondent's objections and will sign the Order Denying Motion to Set Aside Decree of Divorce as it has been submitted.

Respondent's Objection to Order Regarding Objection to Community Service

The Court notes that Respondent has objected to paragraph 2 of the Order, asserting that Respondent was never ordered to do community service through the United Way and arguing that he should not be ordered to do community service again just because the Court felt

uncomfortable with the service he did render. The Court finds that paragraph 2 of the submitted Order accurately states the Court's finding in which Judge Laycock used the United Way as an example of an entity that was to supervise Respondent's work. However, because other entities besides the United Way could have supervised Respondent's community service following the Court's initial order, the Court will strike the words "by the United Way" from the Order so that paragraph 2 now reads, "2. Any work that was completed by the Respondent could not have been supervised as directed by the Court." The remainder of Respondent's objections are to the substance of the Ruling rather than to the form of the Order. The Court therefore overrules Respondent's remaining objections and will sign the submitted Order Regarding Objection to Community Service with the change indicated.

Respondent's Objection to Order on Objection to Order on Order to Show Cause

The Court notes that Respondent has objected to paragraph 2 in which the Court reaffirmed the entire order of the Commissioner except for certain portions that were stricken. Respondent argues that Commissioner Patton and Judge Laycock violated Chapter 12 of the Code of Judicial Conduct when they made their rulings. Once again, Respondent's objection is not to the form of the submitted Order, but to substance of the Ruling and the conduct of the judges who made the Ruling. Therefore, the Court overrules Respondent's objections and will sign the submitted Order on Objection to Order on Order to Show Cause.

Respondent's Objection to Order Denying Objection to Prior Order of Attorney's Fees

The Court notes that Respondent has objected to paragraph 2, arguing that Respondent never received notice of the original hearing on the attorney's fees issue. A review of the record shows that Respondent made this same argument during the July 28, 2003 hearing and Judge Laycock found that notice was sent in a timely manner to Respondent's counsel, the Court held a hearing with counsel for both parties present, and an order was issued. The Court finds that if notice of a hearing was sent to the counsel of a represented party, then the party is deemed to be on notice of the hearing. Therefore, the Court overrules Respondent's objection and will sign the submitted Order Denying Objection to Prior Order of Attorney's Fees.

Dated this 7th day of February, 2006.

BY THE COURT:

JUDGE FRED D. HOWARD
District Court Judge

1688

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 7th day of February, 2006 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Petitioner:

Rosemond G. Blakelock
305 East 300 South
Provo, Utah 84606

Attorney for Respondent:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070

Deputy Court Clerk

Rosemond Blakelock #6183
Attorney for Petitioner
75 South 300 West
Provo, Utah 84601
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	ORDER ON OBJECTIONS TO TRUST DEED AND TRUST DEED NOTE DRAFTED BY PETITIONER Case No. 004401468 Judge Claudia Laycock

This matter came on as for hearing on the 28th day of July, 2003, before the Honorable Claudia Laycock. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present, with his counsel, Matthew Woolsey. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER

1. The Court heard arguments regarding the Respondent's Objection regarding the Trust Deed note and Trust Deed. The Court grants in part and denies in part the Objections and so notes the

particular portions granted and denied as is fully set forth below.

2. The Court agrees that the Trust Deed note drafted by the Respondent was an attempt on the part of the Respondent to thwart the prior orders of the Court and to thwart the intent and orders as set forth in the parties' Decree of Divorce.

3. The Court does specifically find that the language placed in the Trust Deed Note by the Respondent was an effort to circumvent the Orders of the Court and an attempt to cut off the Petitioner's ability to collect the amounts due and owing to her.

4. The Court declines to hold the Respondent in contempt but does agree that the Petitioner is not bound by the Trust Deed and Trust Deed Note prepared by the Respondent.

5. The Court accepted the Respondent's statement - made in open court - through his counsel that the Respondent had no objections to the Trust Deed prepared by Petitioner and directs that within 72 hours the Respondent shall sign and execute the Trust Deed prepared by Petitioner and deliver the same to her counsel, Rosemond Blakelock.

6. As to the Trust Deed Note, the Court orders that the Trust Deed Note drafted by Petitioner shall be the one utilized by the parties, after some alterations have been made to the document as directed by the Court and the new Note shall

then be delivered to Respondent's counsel, Mr. Woolley. The Respondent shall then have 72 hours to sign the new Trust Deed Note and deliver the same back to counsel for Petitioner, Rosemond Blakelock.

7. The Trust Deed Note as previously submitted to the Respondent shall have paragraph 3 stricken because it does not reflect the language in the parties' Amended Decree.

8. The Court finds that it is standard procedure for a Decree to refer to documents which shall be drafted at a later date and that the Decree itself cannot include all details that will be contained in the document referred to in the Decree itself.

9. The Court finds that paragraph 5 of the Amended Decree is controlling and the issue of the timeliness of payments shall be left to the Court.

10. The Court directs that the new Trust Deed Note shall not contain a provision for late payments clause and an Order to Show Cause shall be the vehicle to enforce problems with late payments.

11. Paragraph four shall be stricken of the old Trust Deed Note prepared by Petitioner and in Paragraph 5 the words "upon 10 days prior written notice to payee" shall be stricken.

12. Paragraph 6 shall be left intact as it is a benefit to the Respondent.

13. Because no objection was made to the Trust Deed itself the Court orders that no changes be made in that document.

14. Neldon Johnson is directed to sign the new Trust Deed Note within 72 hours of receiving the document. The Court wants the document signed and returned to Petitioner's counsel within 72 hours - or three working days. The Court specifically advises Neldon Johnson that failure to sign the document as directed by the Court will be considered contempt of the court. The Court admonished that the parties need to move on with their lives.

DATED this 7th day of February, 2006

BY THE COURT:

Judge ~~Claudia Laycock~~

APPROVED AS TO FORM

_____
Matthew Woolley

NOTICE TO COUNSEL, Matthew Woolley

TO: Matthew Woolley
326 North SR 198 Suite 210
Salem, Utah 84653

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 30 day of July, 2003.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 30th day of July 2003, I mailed a copy of the Order to Mattthew Woolley at the above listed address, via first class mail.

DEED OF TRUST NOTE

STATE OF UTAH, COUNTY OF UTAH, ss.

April ____ 2003

$2,800,000.00

FOR VALUE RECEIVED, NELDON PAUL JOHNSON, ("Maker"), hereby covenants and promises to pay to INA MARIE JOHNSON, ("Payee"), or order, at Payee's address first above written or at such other address as Payee may designate in writing, Two Million Eight Hundred Thousand Dollars ($2,800,000.00), lawful money of the United States of America, which principal shall be payable, without interest, in equal monthly installments of Eight Thousand Three Hundred Thirty Three and 33/100ths Dollars ($8,333.33) each, commencing on the 15th day of July, 2001, and continuing on the 15th day of each month thereafter, until June 1, 2006, on which date all outstanding principal shall be due and payable.

Maker covenants and agrees with Payee as follows:

1. Maker will pay the indebtedness evidenced by this Note as provided herein.

2. This Note is secured by a deed of trust of even date herewith (the "Deed of Trust"), which Deed of Trust is a lien upon the property which is more particularly described in the Deed of Trust and a Security Agreement covering certain inventory. All of the covenants, conditions and agreements contained in the Deed of Trust and the Security Agreement expressly are incorporated by reference herein and hereby are made a part hereof. In the event of any conflict between the terms of this Note and the terms of the Deed of Trust or the Security Agreement, the terms of the Deed of Trust and/or the Security Agreement shall be paramount and shall govern.

3. Maker shall pay a late payment premium of ten percent of any principal or interest payment made more than three (3) days after the due date thereof, which premium shall be paid with such late payment. This paragraph shall not be deemed to extend or otherwise modify or amend the date when such payments are due hereunder. The obligations of Maker under this Note are subject to the limitation that payments of interest shall not be required to the extent that the charging of or the receipt of any such payment by the holder of this Note would be contrary to the provisions of law applicable to the holder of this Note limiting the maximum rate of interest which may be charged or collected by the holder of this Note.

4. The holder of this Note may declare the entire unpaid amount of principal and interest under this Note to be immediately due and payable if Maker defaults in the due and punctual payment of any installment of principal or interest hereunder.

5. Maker shall have the right to prepay the indebtedness evidenced by this Note, in whole or in part, without penalty, ~~upon ten days prior written notice to Payee~~. The installment payments provided for herein shall continue without change after any such prepayment.

6. Maker, and all guarantors, endorsers and sureties of this Note, hereby waive presentment for payment, demand, protest, notice of protest, notice of nonpayment, and notice of dishonor of this Note. Maker and all guarantors, endorsers and sureties consent that Payee at any time may extend the time of payment of all or any part of the indebtedness secured hereby, or may grant any other indulgences.

7. Any notice or demand required or permitted to be made or given hereunder shall be deemed sufficiently made and given if given by personal service or by the mailing of such notice or demand by certified or registered mail, return receipt requested, addressed, if to Maker, at Maker's address first above written, or if to Payee, at Payee's address first above written. Either party may change its address by like notice to the other party.

8. This Note may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change, modification, termination, waiver, or discharge is sought. This Note shall be construed and enforced in accordance with the

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laws of Utah.

IN WITNESS WHEREOF, Maker has executed this Note as of the date first above written.

NELDON PAUL JOHNSON

STATE OF UTAH, COUNTY OF UTAH, ss.

On the day of July, 2003, before me personally appeared NELDON PAUL JOHNSON, the signer of the above Note, who duly acknowledged to me that he executed the same.

Notary Public
My commission expires on

APPROVED AS TO FORM:

Ina Bodell

TRUST DEED NOTE

STATE OF UTAH, COUNTY OF UTAH, ss.

July____2003

$2,800,000.00

FOR VALUE RECEIVED, NELDON PAUL JOHNSON, ("Maker"), hereby covenants and promised to pay to INA MARIE JOHNSON, ("Payee"), or order, at Payee's address first above written or at such other address as Payee may designate in writing, Two Million Eight Hundred Thousand Dollars ($2,800,000.00), lawful money of the United States of America, which principle shall be payable, without interest, in equal monthly installments of Eight Thousand Three Hundred Thirty Three and 33/100ths Dollars ($8,333.33) each, commencing on the 15th day of July, 2001, and continuing on the 15th day of each month thereafter, until June 1, 2006, on which date all outstanding principal shall be due and payable.

Maker covenants and agrees with Payee as follows:

1. Maker will pay the indebtedness evidenced by this Note as provided herein.

2. This Note is secured by a deed of trust of even date herewith (the "Deed of Trust"), which Deed of Trust is a lien upon the property which is more particularly described in the Deed of Trust and a Security Agreement covering certain inventory. All of the covenants, conditions and agreements contained in the Deed of Trust and the Security Agreement expressly are incorporated by reference herein and hereby are made a part hereof. In the event of any conflict between the terms of this Note and the terms of the Deed of Trust or the Security Agreement, the terms of the Deed of Trust and/or the Security Agreement shall be paramount and shall govern.

3. Maker shall have the right to prepay the indebtedness evidenced by this Note, in whole or in part, without penalty. The installment payments provided for herein shall continue without change after any such prepayment.

4. Maker, and all guarantors, endorsers and sureties of this Note, hereby waive presentment for payment, demand, protest, notice of protest, notice of nonpayment, and notice of dishonor of this Note. Maker of all guarantors, endorsers and sureties consent that Payee at any time may extend the time of payment of all or any part of the indebtedness secured hereby, or may grant any other indulgences.

5. Any notice or demand required or permitted to be made or given hereunder shall be deemed sufficiently made and given if given by personal service or by the mailing of such notice or demand by certified or registered mail, return receipt requested, addressed, if to Maker, at Maker's address first above written, or if to Payee, at Payee's address first above

written. Either party may change its address by like notice to the other party.

6. This Note may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change, modification, termination, waiver, or discharge is sought. This Note shall be construed and enforced in accordance with the laws of Utah.

IN WITNESS WHEREOF, Maker has executed this Note as of the date first above written.

_____
NELDON PAUL JOHNSON

STATE OF UTAH, COUNTY OF UTAH, ss.

On the _____day of July, 2003, before me personally appeared NELDON PAUL JOHNSON, the signer of the above Note, who duly acknowledged to me that he executed the same.

_____
Notary Public
My commission expires on:_____

Rosemond Blakelock #6183
Attorney for Petitioner
75 South 300 West
Provo, Utah 84601
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	ORDER DENYING MOTION TO SET ASIDE DECREE OF DIVORCE Case No. 004401468 Judge Claudia Laycock

This matter came on as for hearing on the 28th day of July, 2003, before the Honorable Claudia Laycock. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present, with his counsel, Matthew Woolsey. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER

1. The Court heard arguments of both parties, and noted that it had examined all documents, including the Amended Decree of Divorce.

2. The Court finds that page 2 of the Amended Decree at paragraph 3A states that the Petitioner was awarded the real property which included the home and surrounding acreage and finds that the language is clear and unambiguous.

3. The Court then read into the record the exact language of the parties Amended Decree and concluding that the Court had examined the four corners of the document and sees no ambiguity in the document and concludes that the meaning of the document is clear.

4. The Court also finds that the parties have litigated various issues in the Amended Decree for two years and that both parties have relied on the document at many hearing held and also finds this is the first time the Respondent has claimed not to understand the meaning of the Amended Decree.

5. The Court finds that as a whole the meaning regarding real property is clear.

6.The Court finds that the only mention of the real property in question is on pages two and three of the Amended Decree and that there is no other place in the Amended Decree where the same property is discussed and that the Respondent has no rights in the property reserved in any other portion of the document.

7. The Court finds that the Petitioner was awarded all right and title to the real property and finds that the Respondent's

request that the Court believe, at this time, that the real property was really separate pieces of property is not a request that can be granted by the Court.

8. The Court finds that the Amended Decree is very clear and that the award to Petitioner of the homes and surrounding acreage is very clear in it's meaning.

9. The Court also finds that the Rule 60 b Motion filed by the Respondent was late and untimely.

10. The Court concludes that the Respondent's Motion to Set aside the Decree for the reasons as set forth above should be denied and is hereby denied.

DATED this 7th day of February, 2006

BY THE COURT:

Judge ~~Claudia Laycock~~

APPROVED AS TO FORM

_____
Matthew Woolley

NOTICE TO COUNSEL, Matthew Woolley

TO: Matthew Woolley
326 North SR 198 Suite 210
Salem, Utah 84653

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 30 day of July, 2003.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 30th day of July 2003, I mailed a copy of the Order to Matthew Woolley at the above listed address, via first class mail.

Rosemond Blakelock #6183
Attorney for Petitioner
75 South 300 West
Provo, Utah 84601
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	ORDER REGARDING OBJECTION TO COMMUNITY SERVICE Case No. 004401468 Judge Claudia Laycock

This matter came on as for hearing on the 28th day of July, 2003, before the Honorable Claudia Laycock. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present, with his counsel, Matthew Woolsey. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER

1. The Court finds that the claims of the Respondent regarding the documents he submitted to establish that he had fulfilled his community service requirements are not acceptable.

2. Any work that was completed by the Respondent could not have been supervised ~~by the United Way~~ as directed by the Court.

3. The Court finds that it has no intent to allow the Respondent to avoid the Court's orders that he complete 100 hours of community service.

4. While the Court declines to hold the Respondent in contempt, it is clear to the Court that the Respondent failed to comply with the spirit of the Court's order that the Respondent complete 100 hours of community service.

5. The Court expected that the community service would be an activity that was in addition to the Respondent's activities with his employment or job and was frankly surprised when the Respondent claimed to have completed it so quickly.

6. The Court notes that generally people take months to complete community service. While the Court intends to give the Respondent the benefit of the doubt and not hold the Respondent in contempt, the Court does direct that the Respondent complete 100 hours of community service as directed below.

7. The Respondent shall - on this day - report to United Way and sign up for one of the United Way Community Service projects.

8. The Respondent shall complete 100 hours of community services with the United Way and the service shall be done for people who have nothing to do with the Respondent's business,

nothing to do with the Respondent's business projects and nothing to do with the Respondent's job or those he knows through his business contacts.

9. The Respondent is directed to perform his community service in a project that is directed by and suggested by the United Way.

10. The Respondent shall be given time to complete his community services hours and he shall have until January 1, 2004 to complete his 100 hours of services.

11. The community services hours needs to be signed off by someone who has nothing to do with the Respondent or his business interests and nothing to do with the Respondent's personal life.

12. The proof of the Respondent's community service hours must be filed with the Court and a copy given to counsel for the Petitioner no later than January 2, 2004.

DATED this 7th day of February, 2006

BY THE COURT:

Judge ~~Claudia Laycock~~

APPROVED AS TO FORM

Matthew Woolley

NOTICE TO COUNSEL, Matthew Woolley

TO: Matthew Woolley
326 North SR 198 Suite 210
Salem, Utah 84653

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 30 day of July, 2003.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 30th day of July 2003, I mailed a copy of the Order to Matthew Woolley at the above listed address, via first class mail.

Rosemond Blakelock #6183
Attorney for Petitioner
75 South 300 West
Provo, Utah 84601
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	ORDER ON OBJECTION TO ORDER ON ORDER TO SHOW CAUSE Case No. 004401468 Judge Claudia Laycock

This matter came on as for hearing on the 28th day of July, 2003, before the Honorable Claudia Laycock. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present, with his counsel, Matthew Woolsey. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER

1. The Objections to the Order on Order on Order to Show Cause issued as the result of the March 7, 2003 before the

Honorable Thomas Patton should be granted in part and denied in part.

2. The Court reaffirms the entire order excepting a portion of paragraph 15 which should be stricken and a portion of paragraph 19 which should be stricken.

3. The Court made the changes to the proposed order in open court and then proceeded to sign the document.

4. All other portions of the Order on Order to Show Cause shall remain in full force and effect and the Court denies the request to make any other changes or amendments.

DATED this 7th day of February, 2006

BY THE COURT:

Judge Claudia Laycock

APPROVED AS TO FORM

Matthew Woolley

NOTICE TO COUNSEL, Matthew Woolley

TO: Matthew Woolley
326 North SR 198 Suite 210
Salem, Utah 84653

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 30 day of July, 2003.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 30th day of July 2003, I mailed a copy of the Order to Matthew Woolley at the above listed address, via first class mail.

Rosemond Blakelock #6183
Attorney for Petitioner
75 South 300 West
Provo, Utah 84601
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	ORDER DENYING OBJECTION TO PRIOR ORDER OF ATTORNEY'S FEES Case No. 004401468 Judge Claudia Laycock

This matter came on as for hearing on the 28th day of July, 2003, before the Honorable Claudia Laycock. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present, with his counsel, Matthew Woolsey. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER

1. The Objections to the prior order of attorney's fees and motion to set aside prior judgment for attorney's fees is hereby denied by the Court.

2. The Court notes that notice was sent in a timely manner to both the Respondent and his counsel and finds that the Court held hearing and arguments and an order was issued. The court denies the request for reconsideration of it's prior orders.

DATED this 7th day of February, 2006

BY THE COURT:

Judge Claudia Laycock

APPROVED AS TO FORM

Matthew Woolley

NOTICE TO COUNSEL, Matthew Woolley

TO: Matthew Woolley
326 North SR 198 Suite 210
Salem, Utah 84653

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 30 day of July, 2003.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 30th day of July 2003, I mailed a copy of the Order to Matthew Woolley at the above listed address, via first class mail.

APPENDIX B

RULINGS ISSUED BY THE COURT

Ruling Re: Petitioner's Objection To Notice to Submit In Re: Respondent's Motion To Set Aside Decree of Divorce
signed by the court on February 23, 2006

Ruling and Order Re: Respondent's Objection to Newly Prepared Trust Deed Note and Trust Deed
signed by the Court on February 23, 2006

Ruling Re: Order to Show Cause
signed by the court on February 23, 2006

Ruling Re: Respondent's Objection to Order Regarding the January 23, 2006 Hearing
signed by the court February 27, 2006

Ruling Re: Affidavit of Attorney's Fees
signed by the court February 27, 2006

Ruling of Judge Gary Stott
signed by Judge Stott on December 5, 2003

Notice of Appeal (first one) regarding Judge Stott's Ruling
filed on January 6, 2004

Memorandum Decision issued July 22, 2004

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	**RULING RE: PETITIONER'S OBJECTION TO NOTICE TO SUBMIT IN RE: RESPONDENT'S MOTION TO SET ASIDE DECREE OF DIVORCE** Case # 004401468 Judge Fred D. Howard Division 5

This matter comes before the Court on Petitioner's *Objection to Notice to Submit in re: Respondent's Motion to Set Aside Decree of Divorce.* The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

The Court notes that Respondent filed a Motion to Set Aside Decree of Divorce with an accompanying memorandum on January 13, 2006. Respondent filed a Notice to Submit on February 6, 2006. Petitioner filed an Objection to Respondent's Notice to Submit on January 7, 2006.

In his Motion, Respondent asserts that the amended decree of divorce must be set aside for the following reasons: (1) there was no meeting of the minds on the integral features of the divorce decree; (2) the decree was unilaterally altered by Commissioner Patton; (3) the decree left critical terms and conditions of the trust deed and trust deed note to future negotiations; (4)

the decree lacks essential terms; (5) the decree cannot be enforced because of the indefiniteness of the existing terms and conditions; and (6) the modification initiated by Commissioner Patton fails because there was no mutual consent by the parties.

In her Objection, Petitioner asserts that counsel for both parties conducted a telephonic conference the week of January 30, 2006 and it was mutually stipulated that Respondent had previously filed a Motion to Set Aside Decree of Divorce on the same grounds and for the same reasons as the present motion. Petitioner argues that if the Court signs the Order Denying Motion to Set Aside Decree of Divorce from the July 28, 2003 hearing, then Respondent cannot resubmit the same motion and the issue is res judicata.

The Court notes that the issues addressed by Respondent's current motion were already addressed and ruled on at a hearing held on July 28, 2003 before the Honorable Judge Claudia Laycock. The Court has reviewed the file and signed the Order Denying Motion to Set Aside Decree of Divorce. The Court finds that the issue is res judicata and therefore sustains Petitioner's Objection.

Dated this 23 day of February, 2006.

BY THE COURT:

JUDGE FRED D. HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 23 day of February, 2006 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Petitioner:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601

Attorney for Respondent:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070

Deputy Court Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	RULING AND ORDER RE: RESPONDENT'S OBJECTION TO NEWLY PREPARED TRUST DEED NOTE AND TRUST DEED Case # 004401468 Judge Fred D. Howard Division 5

This matter comes before the Court on Respondent's *Objection to Newly Prepared Trust Deed Note and Trust Deed.* The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING AND ORDER

The Court notes that a hearing was held before the Honorable Judge Claudia Laycock on July 28, 2003. At that hearing, the Court heard arguments regarding Respondent's Objections to a trust deed and trust deed note that were drafted by Petitioner. Judge Laycock granted in part and denied in part Respondent's Objections and directed Petitioner to make changes to paragraphs 3, 4, and 5 of the Trust Deed Note. On August 1, 2003, Respondent filed an Objection to Newly Prepared Trust Deed Note and Trust Deed.

Respondent objects to the last sentence of paragraph two (2) of the Trust Deed Note, which states: "In the event of any conflict between the terms of this Note and the terms of the Deed of Trust or the Security Agreement, the terms of the Deed of Trust and/or Security

Agreement shall be paramount and shall govern." Respondent argues that Petitioner is mocking the Court by keeping this language in the Trust Deed Note because the Deed of Trust remains unchanged and contains language that does not reflect the changes the Court specifically made to the Trust Deed Note. Respondent also objects to the last sentence of paragraph three (3) of the Trust Deed Note, which states, "The installment payment provided for herein shall continue without change after any such payment." Respondent argues that the effect of this clause is an acceleration of the debt on Respondent and goes contrary to the provision of the parties' Amended Decree of Divorce. Respondent also raises numerous specific objections to provisions in the Trust Deed.

The Court has reviewed the transcript from the July 28, 2003 hearing and notes that Respondent was given the opportunity by the Court to make objections to both the Trust Deed Note and the Trust Deed, but only made specific objections to paragraphs 3, 4, and 5 of the Trust Deed Note that had been submitted by Petitioner. The hearing transcript reveals that Respondent did not initially assert any objection to the Trust Deed. When asked twice by the Court whether he had an objection to the Trust Deed, Respondent claimed that he only objected to the Trust Deed Note and not to the Trust Deed. When Respondent apparently changed his position as to the Trust Deed, he was not able to articulate any specific objections to the document and therefore made a generalized objection to the Trust Deed in its entirety. It is clear from the record that Judge Laycock determined, given Respondent's previous waiver of an objection and

lack of specificity, that no objection was made. The Court finds that the newly prepared Trust Deed Note submitted by Petitioner was modified in accordance with the Court's Ruling and Order.

Respondent objects to the last sentence of paragraph two (2) of the newly prepared Trust Deed Note because it would effectively allow the provisions of the Trust Deed to govern when such provisions conflict with those of the Trust Deed Note. On July 28, 2003, the Court made rulings pertaining to late payment premiums, debt acceleration in the event of a progress payment default, and a notice requirement for debt prepayment. The Court finds that in the event a provision of the Trust Deed conflicts with rulings made by the Court, the Court's rulings and orders will govern. However, because Respondent failed to make a timely objection to the last sentence of paragraph two (2), such language will remain and the Trust Deed shall govern insofar as it does not conflict with the Court's rulings.

The Court finds that Respondent's objection to the last sentence of paragraph three (3) of the Trust Deed Note is untimely. Furthermore, the Court finds that Respondent's argument regarding acceleration in the event of prepayment is not compelling. Because Respondent is not required to prepay the indebtedness to Petitioner, any alleged acceleration that may occur in the event of a prepayment can easily be avoided by Respondent. The Court also finds that Respondent's numerous objections to the Trust Deed were waived when Respondent failed to make a specific objection to the Trust Deed at the July 28, 2003 hearing. The Court therefore

overrules Respondent's untimely objections. The Court hereby orders Respondent to sign the newly prepared trust deed note and trust deed and return them to Petitioner's counsel within ten (10) days of the date of this Ruling and Order.

Dated this 23 day of February, 2006.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST COURT - UTAH COUNTY

JUDGE FRED D. HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 23 day of February, 2006 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Petitioner:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601

Attorney for Respondent:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070

Deputy Court Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	**RULING RE: ORDER TO SHOW CAUSE** Case # 004401468 Judge Fred D. Howard Division 5

This matter comes before the Court on Petitioner's *Order to Show Cause*. The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

The Court notes that Respondent was served with an Order to Show Cause on April 29, 2005 and a hearing was scheduled for May 10, 2005 before Commissioner Thomas Patton. The Court notes that Respondent filed various motions to continue the hearing and to stay the proceedings. On June 20, 2005, Respondent filed an Objection to Order to Show Cause Hearing and Request for Evidentiary Hearing and Jury Trial. On June 28, 2005, Respondent filed a Motion to Disqualify Commissioner Patton. On June 30, 2005, Commissioner Patton recused from the case so that it could move forward. Respondent filed a Renewed Objection to Order to Show Cause on August 29, 2005. A hearing scheduled for September 12, 2005 was continued to January 23, 2006 when counsel for Respondent failed to appear. On January 23, 2006, the Court took under advisement the question of whether the law supports the issuance of a

contempt citation for Respondent's failure to make payments on a debt owed under the terms and language of the parties' Amended Decree of Divorce.

In her Affidavit in Support of Order to Show Cause, Petitioner asserts that Respondent has failed and refused to make monthly installment payments on a debt owed under the terms of the parties' Amended Decree of Divorce. In addition, Petitioner asserts that Respondent has failed and refused to sign and record a trust deed note and trust deed as directed by the Court. Petitioner believes that the security intended to be offered by the Salem property has been pillaged by Respondent and that she is in serious jeopardy of losing the ability to collect her fair share of a property settlement that was intended to replace an award of alimony.

Respondent argues that the Court does not have the authority to impose a citation for contempt against Respondent where the matter pending before the Court pertains only to a property settlement and not to alimony or support payments. Respondent also argues that Petitioner has failed to establish by clear and convincing evidence that Respondent knew what was required of him, that he has the ability to comply, and that he willfully and knowingly failed to do so. In addition, Respondent asserts that he has fulfilled his obligations under the existing divorce decree by transferring 4 parcels of property when only 2 parcels were contemplated under the negotiated divorce decree. Respondent asserts that the value of the additional two parcels far exceeds any amounts due and owing under the decree.

Although article I, section 16 of the Utah Constitution prohibits imprisonment for debt, courts have broad equitable powers to enforce judgments for past-due amounts in family law cases. *See Hamilton v. Regan*, 938 P.2d 282 (Utah 1997). In *Bott v. Bott*, 453 P.2d 402 (Utah 1969), the Utah Supreme Court upheld a contempt order for an ex-husband's failure to pay a sum in monthly payments to his ex-wife. The ex-husband argued that the provision was a money judgment and that a court could not punish him by contempt of court because to do so amounted to imprisonment for debt contrary to the Constitution of the State of Utah. *Id.* at 402. The Utah Supreme Court disagreed, determining that "[i]t is not the label placed by decree upon payments which constitutes them either alimony or lump sum property settlements; it is the elements inherent in the case as a whole, the record of which the decree is a part, which determine to what category such payments belong." *Id.* at 402 (citing to *Walters v. Walters*, 94 N.E.2d 726, 732 (Ill. App. 1950). The Utah Supreme Court found that although the divorce decree categorized the property settlement as one made "in lieu of alimony," the settlement was really an award for the support and maintenance of the ex-wife. *Id.* at 403.

In this case, the parties' Amended Decree of Divorce provides for a property settlement where Respondent shall pay to the Petitioner the sum of $8,333.33 on a monthly basis until July 1, 2006, when any amounts still due and owing shall be paid with a balloon payment. Paragraph 11 of the Amended Decree provides as follows: "In consideration of the foregoing award, there should be no award of alimony to Petitioner." Given the Utah Supreme Court's holding in *Bott*

v. Bott, 453 P.2d at 403, this Court finds that the law allows for the issuance of a contempt citation for failure to make payments on a divorce property settlement, even if such settlement was made in lieu of alimony. Respondent argues that he cannot be held in contempt for the failure to make monthly payments in this case because the Amended Decree calls for a balloon payment on July 1, 2006 and that date has not yet passed. However, subparagraphs (a) and (b) of Paragraph 5 have to be read together, and the Court finds that subparagraph (b) does not nullify Respondent's obligation to make monthly payments in accordance with subparagraph (a).

Before this Court will hold Respondent in contempt for his failure to make monthly payments to Petitioner and for his failure to sign the Trust Deed and Trust Deed Note,"it must appear by clear and convincing proof that: (1), the party knew what was required of him; (2), that he had the ability to comply; and (3), that he wilfully and knowingly failed and refused to do so." *Thomas v. Thomas*, 569 P.2d 1119, 1121 (Utah 1977). Respondent claims that he did not know what was required of him because several judgments remained outstanding and unsigned by the Court at the time of the January 23, 2006 hearing. Such issues have been ruled on and the Orders have since been signed by the Court. Respondent also claims that he does not have the ability to comply and has evidence justifying his failure to comply. The question of Respondent's ability to perform is a question of fact that the Court will need to resolve at an evidentiary hearing. Therefore, the Court will send notice of a telephone scheduling conference to address the

question of the purported need for limited discovery between the parties and to set a time for an evidentiary hearing.

Dated this 23 day of February, 2006.

BY THE COURT:

JUDGE FRED D. HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 23 day of February, 2006 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Petitioner:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601

Attorney for Respondent:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070

Deputy Court Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	**RULING RE: RESPONDENT'S OBJECTION TO ORDER REGARDING THE JANUARY 23, 2006 HEARING** Case # 004401468 Judge Fred D. Howard Division 5

This matter comes before the Court on Respondent's *Objection to Order Regarding the January 23, 2006 Hearing.* The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

The Court notes that a hearing was held on January 23, 2006. Counsel for Petitioner was instructed to prepare the Order, which Petitioner mailed to Respondent on February 7, 2006. Respondent faxed an Objection to the Court on February 21, 2006. Petitioner filed a Response to the Objection on February 23, 2006.

Respondent objects to paragraph one, asserting that the Court did not find that Petitioner was entitled to a judgment in the amount of $223,982.97. Petitioner asserts that the submitted Order comports exactly with what the record of the hearing reflects.

The Court has reviewed the record from the hearing and finds that the Order submitted by Petitioner does indeed comport with the Court's ruling. Paragraph one of the submitted Order

states the following: "Pursuant to the stipulation of the parties the Petitioner is hereby granted a judgment in the amount of $223,982.97 as for past due amounts due and owing by Respondent to the Petitioner through January 31, 2006." Although Respondent argued that he inadvertently deeded some real property to Petitioner whose value exceeds the past-due payment amounts, the Court found that Respondent's claim is for a credit and would be the subject of an appeal. The parties stipulated that the Amended Decree calls for monthly payments from Respondent to Petitioner and that such payments have not been made; therefore, the Court awarded Petitioner a judgment for the past-due payments to supplement her prior judgments against Respondent. The Court respectfully overrules Respondent's Objection to Order Regarding the January 23, 2006 Hearing and will sign the Order as submitted.

Dated this 27 day of February, 2006.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST COURT - UTAH COUNTY

JUDGE FRED D. HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 27 day of February, 2006 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Petitioner:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601

Attorney for Respondent:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070

Deputy Court Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, vs. NELDON PAUL JOHNSON, Respondent.	**RULING RE: AFFIDAVIT OF ATTORNEY'S FEES** Case # 004401468 Judge Fred D. Howard Division 5

This matter comes before the Court on Petitioner's submission of an *Affidavit of Attorney's Fees.* The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

The Court notes that during a hearing held on January 23, 2006 the Court awarded Petitioner reasonable attorney's fees for supplementing a judgment against Respondent. Petitioner filed an Affidavit of Attorney's Fees on February 7, 2006, outlining the hours spent and fees incurred for bringing the matter for hearing. Respondent faxed an Objection to the Court on February 21, 2006. Respondent objects to the entire affidavit of attorney's fees except the last four entries. Respondent argues that the award of attorney's fees should be restricted to preparing for and attending the January 23, 2006 hearing, not legal fees charged in 2004.

The Utah Supreme Court has identified four questions that must be addressed by the trial court before attorney's fees may be assessed:

1. What legal work was actually performed?

2. How much of the work performed was reasonably necessary to adequately prosecute the matter?

3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?

4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988).

The Court notes that the legal services provided for Petitioner included reviewing the court file, conducting research, drafting documents, meetings with staff and the client, and preparing for and attending court hearings. Ms. Blakelock spent a total of 20 hours performing legal services at an hourly rate of $180. A member of Ms. Blakelock's staff spent a total of 35.5 hours performing legal services at an hourly rate of $40. The Court finds that the billing rates charged by Petitioner's counsel are consistent with rates customarily charged in this area for this type of service. The Court likewise finds that, given the history of this case and the difficulty in bringing the matter for hearing with the parties and their counsel present, the services rendered by Petitioner's counsel were reasonably necessary to prepare for and attend the January 23, 2006 hearing. Finally, the Court does not find any additional factors that would preclude the Court from awarding attorney's fees to Petitioner.

The Court notes that included in the Affidavit are costs incurred for service fees. The Court may award to Petitioner "costs" that are properly taxable under Rule 54 of the Utah Rules

of Civil Procedure. In regard to costs that may be awarded, the Utah Supreme Court has stated, "Costs were not recoverable at common law; and are therefore generally allowable only in the amounts and in the manner provided by statute." *Frampton v. Wilson*, 605 P.2d 771, 773 (Utah 1980). Elucidating upon the meaning of "costs," the Court stated, "The generally accepted rule is that it means those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment." *Id.* at 774. The Court finds that the service fees claimed by Petitioner are recoverable costs. In accordance with the Court's findings, the Court respectfully overrules Respondent's objections to the Affidavit of Attorney's Fees submitted by counsel for Petitioner. Petitioner shall be awarded a total amount of $5,142.50 to be entered in the Order, In Re: January 23, 2006 Hearing that was also submitted by Petitioner.

Dated this 27th day of February 2006.

BY THE COURT:

JUDGE FRED D. HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 27 day of February 2006 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Petitioner:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601

Attorney for Respondent:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State Street
Sandy, Utah 84070

Deputy Court Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

INA JOHNSON, Petitioner, vs. NELDON JOHNSON, Respondent.	**RULING** CASE NO. 004401468 JUDGE: GARY D STOTT CLERK: KS

RULING

This Court has received from the Respondent, Mr. Johnson, a Motion to Disqualify Judge Claudia Laycock. The affidavit of Mr. Johnson sets forth a number of paragraphs which he claims supports his motion for disqualification. This Court has reviewed the documents pertaining to the issues related to the motion, and has also reviewed part of the video record referred to by Mr. Johnson. As a result of the review this Court concludes that the motion is not supported by the record and that Judge Laycock's handling of all matters on this case was proper and within the rules of judicial conduct. The Court makes the following observations as to some of the claims made by Mr. Johnson as set forth in his supporting affidavit.

1. Mr. Johnson in paragraph three and four of his affidavit claims that Judge Laycock improperly received from the Petitioner a pleading that was not timely filed. Mr. Johnson also claims that Judge Laycock acted improperly by finding him in contempt for what he claims are procedural errors. Finally Mr. Johnson takes the position that Judge Laycock showed preference to Petitioner's position evidenced by her ruling and conduct during the hearings. The record that this Court reviewed does not support Mr. Johnson's claims. A judge has discretion to receive documents which may not be timely filed. The receipt of the document in question was not prejudicial to Mr. Johnson's case. In addition there was not any action on the part of Judge Laycock which demonstrated a preference toward Mrs. Johnson's position.

2. In paragraph five Mr. Johnson claims that he was not treated the same as Petitioner

with respect to the manner in which Judge Laycock reviewed and evaluated the trust deed and note. He also takes the position that the Commissioner did not treat him fairly in dealing with the trust deed and note. Again the record does not demonstrate any support for Mr. Johnson's claim. The record clearly shows an effort on the part of Judge Laycock to fairly and impartially review all of the information concerning the trust deed and note.

3. In paragraph seven, Mr. Johnson alleges Judge Laycock improperly imposed an additional 100 hours of community service after he had already completed the 120 hours previously ordered by her. His claim is that Judge Laycock was dissatisfied because Mr. Johnson was able to complete the previous hours much quicker than Judge Laycock anticipated he would. However a review of the record clearly indicates that Mr. Johnson did not perform the community service as ordered by Judge Laycock. Mr. Johnson claims to have satisfied the community service hours by participating in his own company's project and efforts to develop an energy source for the Navajo people on the reservation. This was work done by him for his company. Mr. Johnson was given a complete opportunity by Judge Laycock to explain why she should accept the time that he was claiming as community service. After hearing Mr. Johnson's explanation, Judge Laycock carefully set forth the reasons why she was not going to accept Mr. Johnson's time spent in his company's efforts as community service. In fact, she instructed Mr. Johnson, as she had evidently done before, to immediately contact the United Way office and to complete 100 hours of community service through that office for projects not associated with Mr. Johnson's business or work. He was given until January 1, 2004 to complete the 100 hours and to report the completion to the Court.

4. Paragraph eight of Mr. Johnson's affidavit complains that he was required to pay attorney fees without proper notice to him or to his counsel. However, the file reflects that a notice dated February 27, 2003, for a hearing on a motion scheduled March 13, 2003, pertained to a hearing on attorney fees. In addition, a minute entry dated March 7, 2003, from Commissioner Patton indicates that the issue of attorney fees was to be heard by Judge Laycock on March 13, 2003. On March 13, 2003, the minute entry indicates that attorney fees were addressed and the Court ruled on them as per the notice.

Rule 63 URCP requires that a motion and affidavit shall provide facts demonstrating a bias, prejudice or conflict of interest on the part of the judge in question. After a careful review of

the record in this case, the information reviewed does not support Mr. Johnson's claims of bias, prejudice or conflict on the part of Judge Laycock. In some instances she did not agree with Mr. Johnson's position and ruled accordingly. This Court views Mr. Johnson's second attempt to disqualify Judge Laycock as an opportunity to exclude her from the case because he disagreed with the rulings made by her and hopes to find a judge that would agree with him. Therefore, the Court finds the facts and claims made by Mr. Johnson are not legally sufficient to support the motion, and the motion is denied. Judge Laycock will remain on the case for all further proceedings.

DATED this 5 day of Dec, 2003.

District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 004401468 by the method and on the date specified.

METHOD	NAME
Mail	ROSEMOND BLAKELOCK ATTORNEY PET 75 S 300 W PROVO, UT 84606
Mail	MATTHEW K WOOLLEY ATTORNEY RES 326 North SR 198 Suite 210 Salem UT 84653

Dated this 5 day of Dec, 2003.

Deputy Court Clerk

Matthew K. Woolley, 8460
Woolley & Associates, P.C.
1775 North 860 West
Orem, Utah 84057
Telephone: (801) 554-1998
Attorney for Respondent

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

Ina Johnson,

Petitioner,

vs.

Neldon Johnson,

Respondent and Appellant

NOTICE OF APPEAL

Civil No. 004401468

Judge: Claudia Laycock

---

1. Notice is hereby given that Respondent and Appellant, Neldon P. Johnson, through counsel, Matthew K. Woolley, appeals to the Utah Court or Appeals the final Order of the Honorable Gary D. Stott entered in this matter on December 5th, 2003.

2. The appeal is taken from the final order entered denying Respondent's Motion to disqualify in the above matter.

DATED this 3rd day of January, 2004.

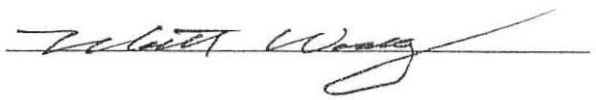
Matthew K. Woolley

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE OF APPEAL was mailed, postage prepaid, faxed or hand delivered to the following:

Rosemond Blakelock
75 South 300 West
Provo, Utah 84606

DATED this 5th day of January, 2004.



4TH DISTRICT COURT - PROVO
DUPLICATE RECEIPT 01/06/04 10:40
01/06/04 10:36 Clerk: pamfw
Receipt Number: 20040020036
Payor: JOHNSON, NELDON PAUL

Received:
Check 1439 $ 205.00

Case 004401468 Divorce/Annulment
Judge: LAYCOCK, CLAUDIA
JOHNSON, INA MARIE VS JOHNSON,
NELDON PAUL
APPEAL $ 205.00

Note: Code Description: APPEAL

******* DUPLICATE RECEIPT *******

4TH DISTRICT COURT - PROVO
DUPLICATE RECEIPT 01/06/04 10:40
01/06/04 10:38 Clerk: pamfw
Receipt Number: 20040020038
Payor: JOHNSON, NELDON PAUL

Received:
Check 1439 $ 200.00

Case 004401468 Divorce/Annulment
Judge: LAYCOCK, CLAUDIA
JOHNSON, INA MARIE VS JOHNSON,
NELDON PAUL
Appeals Bond $ 200.00

******* DUPLICATE RECEIPT *******

IN THE UTAH COURT OF APPEALS

----ooOoo----

Ina Marie Johnson, Petitioner and Appellee, v. Neldon Paul Johnson, Respondent and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040011-CA F I L E D (July 22, 2004) 2004 UT App 249

Fourth District, Provo Department
The Honorable Gary D. Stott

Attorneys: Timothy Miguel Willardson, Sandy, for Appellant
Rosemond G. Blakelock, Provo, for Appellee

Before Judges Bench, Davis, and Greenwood.

PER CURIAM:

Neldon Paul Johnson appeals an order denying a motion to disqualify the assigned district court judge under rule 63 of the Utah Rules of Civil Procedure. This case is before the court on a sua sponte motion for summary dismissal on grounds that the order Appellant seeks to appeal is interlocutory and not a final, appealable judgment.

An appeal of right may be taken only from a final judgment that "ends the controversy between the parties litigant." Bradbury v. Valencia, 2000 UT 50, ¶9, 5 P.3d 649. "For an order or judgment to be final, it 'must dispose of the case as to all the parties and finally dispose of the subject-matter of the litigation on the merits of the case.'" Id. (quoting Kennedy v. New Era Indus., Inc., 600 P.2d 534, 536 (Utah 1979)). The order that Appellant seeks to appeal is not a final judgment because it did not fully dispose of the case.

Appellant argues that the decision being appealed "is of such a fundamental character as to require treatment as a final decision to allow the instant appeal." We have no jurisdiction to consider an appeal of right from a judgment that does not satisfy the final judgment rule. "Orders and judgments that are not final can be appealed if such appeals are statutorily

permissible, if the appellate court grants permission under rule 5 of the Utah Rules of Appellate Procedure, or if the trial court expressly certifies them as final for purposes of appeal under rule 54(b) of the Utah Rules of Civil Procedure." Id. (citations omitted). Appellant did not seek permission to appeal by a timely petition filed in this court complying with rule 5; the order was not certified by the trial court under rule 54(b);[1] and there is no statute allowing an immediate appeal from an interlocutory order denying a motion to disqualify a judge. Once a court has concluded that it lacks jurisdiction, it "retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1998).

Accordingly, we dismiss the appeal for lack of jurisdiction because it is not taken from a final, appealable judgment.

Russell W. Bench,
Associate Presiding Judge

James Z. Davis, Judge

Pamela T. Greenwood, Judge

---

1. In order to be eligible for certification under rule 54(b) of the Utah Rules of Civil Procedure, an order must fully dispose of a separate claim for relief in a case involving multiple claims or parties, and must be certified as final using the language of the rule. See Utah R. Civ. P. 54(b).

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of July, 2004, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

TIMOTHY M. WILLARDSON
NELSON SNUFFER DAHLE & POULSEN
10885 S STATE ST
SANDY UT 84070-4104

ROSEMOND G. BLAKELOCK
BLAKELOCK & STRINGER PA
75 S 300 W
PROVO UT 84606

HONORABLE GARY D STOTT
FOURTH DISTRICT, PROVO DEPT
125 N 100 W
PROVO UT 84603

Deborah Hernandez
Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT, 004401468
APPEALS CASE NO.: 20040011-CA

APPENDIX C
RELEVANT ORDERS AND PLEADINGS

Order On Order To Show Cause
signed by Judge Claudia Laycock July 28, 2003

Order, In Re: January 23, 2006 Hearing
signed by the court on February 27, 2006

Verified Notice of Respondent's Willful Refusal to Sign Trust deed Note As Required In The Court's Ruling Dated February 23, 2006 and Verified Motion for Order of Contempt
filed March 13, 2006

Rosemond Blakelock #6183
Attorney for Petitioner
305 East 300 South
Provo, Utah 84606
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH
125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON, Petitioner, v. NELDON PAUL JOHNSON, Respondent.	*	ORDER ON ORDER TO SHOW CAUSE Case No. 004401468 Judge Claudia Laycock

This matter came on as for hearing on the 7th day of March, 2003, before the Honorable Thomas Patton. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present, and was represented by his counsel, Thomas Seiler. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein as well as the case law supplied to the Court by Respondent's counsel, and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER ON ORDER TO SHOW CAUSE

1. The Court advised both parties, as well as both counsel, in open court and on the record, that Judge Claudia Laycock intended to hear the pending issue of Petitioner's award of attorney's fees regarding the prior hearing held on August 19, 2002. The Court advised both counsel and the parties that the Commissioner had discussed the matter with Judge Laycock and she intended to hear the matter on March 13, 2003. The Court noted that the Petitioner had previously been awarded attorney's fees, the Respondent had objected and requested a hearing on the matter and that Judge Laycock had sent notice to both counsel that issue of attorney's fees for the August 19, 2002 hearing would be heard by Judge Laycock on March 13, 2003. Counsel for both parties acknowledged that they understood that the issue would not be heard by Commissioner Thomas Patton because Judge Laycock had already set it for hearing and so notified the parties.

2. The Respondent signed the proposed Quit Claim Deed in open court and resolved the issue as to the signing of the Quit Claim Deed.

3. Respondent submitted a document which he claimed verified that he had completed the community service, as required by Judge Laycock.

4. Regarding the Petitioner's request for an order of contempt against Respondent for his failure to pay the judgments previously granted by the Court, the Court finds that pursuant to Coleman v. Coleman 664 P.2d 1155, (1983) an order of contempt must be proven by clear and convincing evidence. Because the prior judgments granted by the court and issued by Judge Laycock, did not include a specific payment schedule plan for the Respondent, the Court declines, at this time, to hold the Respondent in contempt for his refusal to pay the past due judgments that have been previously granted by the Court. The prior orders of the Court lack the specificity as to the repayment schedule that would be required, prior to the Court's granting the Petitioner's request to impose a contempt citation on the Respondent for his failure to pay the past due judgments.

5. Regarding the Petitioner's claim that the Respondent failed to deliver the real property to the Petitioner free from past due taxes, the Court finds that which ever party received the rental income from the property located at 7420 North 4850 West, American Fork, Utah would be the party who was responsible for the tax obligation on the property.

6. Therefore, the court sets this matter for additional hearing as to the issue of past due tax obligations and shall hear the issue on April 25, 2003 at the hour of 2:00 p.m.

7. At the time when the Respondent transferred the property to the Petitioner by allowing her to receive the rental income from the property is the date upon which the property taxes were to have been paid in full by Petitioner. From the date upon which the Petitioner began to receive the rental income from the property is the date upon which the Petitioner's obligation as for property taxes would have begun.

8. The parties are directed to bring such proof to court on April 25, 2003 as to enable the Court to issue a determination as to any past due taxes due and owing by the Respondent in this matter.

9. The Court grants the Petitioner a judgment in the amount of $41,665.00 as the for monthly payments due to the Petitioner for the monthly payments in the amount of $8,333.00 per month for October 2002, November 2002, December 2002, January 2003 and February 2003, all of which the Respondent failed to pay to the Petitioner.

10. The Court finds that the Trust Deed Note and Trust deed which have been prepared and submitted to the Court by the Respondent contain only the signature of the Respondent. The Court has examined the document and that there is no indication on the document that the Petitioner, or the Court has approved the document.

11. The Court finds that Neldon Johnson has crafted a Trust Deed Note and Trust Deed which were intended to amend the Decree of Divorce and intended to unilaterally, by execution of the Trust Deed and Trust Deed Note, alter the terms of the Decree of Divorce.

12. The Court finds that the parties' file, which is now four volumes thick, is replete with instances of the Court's having found that Neldon Johnson has difficulty obeying the orders of the Court.

13. The Court finds, in reviewing the Trust Deed Note, that it references the parties' Decree of Divorce at paragraph 5.

14. The documents Trust Deed documents drafted by the Respondent also states that "if [the] maker fails to pay any payment provided by this Note when due the exclusive remedy [of] the holder of the Trust Deed and this note shall be the foreclosure of the Trust Deed and the holder shall not be entitled to recover from [the] maker any deficiency under this note."

15. The Court specifically finds that such a document is an attempt to thwart prior orders of the Court~~, and finds that it is contemptuous. Therefore, the Court hereby finds that Neldon Johnson is in contempt of the Court, for his actions in this~~

matter and held in contempt for his attempt to alter prior orders of the Court. See order from hearing held on 28 July 2003.

16. The Court specifically finds that the Petitioner is not bound by the Trust Deed Note and Trust Deed prepared by the Respondent. The Court, in part, relies on Brown v. Brown 744P.2d 333 (1987), wherein the case stated that one parties' silence cannot be construed to be consent. Specifically, the Court finds that the Respondents' signing of the Trust Deed Note does not bind the Petitioner to it's terms.

17. Therefore, the Court does not accept the Trust Deed Note, nor the Trust Deed, prepared by the Respondent. The Petitioner shall cause her own Trust Deed and Trust Deed Note to be prepared and delivered to Thomas Seiler's office within 30 days of March 7, 2003. Mr. Seiler shall then have two weeks, following the delivery of the documents to his office, to insure that Neldon Johnson signs the Trust Deed and Trust Deed Note prepared by the Petitioner.

18. If Neldon Johnson fails to sign the documents prepared by the Petitioner, the appropriate sanctions shall then enter. Contrary to the Respondent's claim that the "one-action rule" applies in this case, the Court specifically finds that there are two actions taking place. The first is that the Court previously ordered the Respondent to pay $8,333.00 per month to the

Petitioner, as for her share of the parties' property interest. The Court has no intention to allow the Respondent to bankrupt out on his obligations to the Petitioner. The Court finds that the Petitioner has the right to seek judgments and contempt citations, as she may need to do. The Court specifically finds that Neldon Johnson cannot thwart the prior orders of the Court by his unilateral attempts to prepare invalid Trust Deed Notes and a Trust Deed.

19. The Petitioner is absolutely entitled to seek relief in the parties' divorce action. ~~If the Respondent is not current in his obligations, including past due judgments, to the Petitioner by the date of December 1, 2003, then the entire outstanding balance becomes due and payable as of December 1, 2003 and that order is the sanction that the Court shall impose for the Respondent's willful disregard of the prior orders of the Court.~~

20. The previously ordered monthly payments shall be made by Respondent to the Petitioner and he shall not be entitled to bankrupt out of his obligations. The Trust Deed and Trust Deed Note were intended to guarantee the Petitioner a method of obtaining her share of the marital property.

21. Pursuant to Openshaw v. Openshaw, 42 P.2d 191 (1935) the Petitioner need only show to the Court that the Respondent had an

existing monthly obligation to the Respondent and he failed to make his monthly payments as previously ordered by the Court.

22. The Court grants the Petitioner a judgement in the amount of $250.00 as for attorney's fees and costs.

DATED this 28th day of July, 2003.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT · UTAH COUNTY

Claudia Laycock
District Court Judge

Commissioner Thomas Patton

APPROVED AS TO FORM

_____
Thomas Seiler

NOTICE TO COUNSEL, Thomas Seiler

TO: Thomas Seiler
80 North 100 East,
Provo, Utah 84606

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 3 day of April, 2003.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 3 th day of April, 2003, I hand delivered a copy of the Order to Thomas Seiler at the above listed address, via personal, hand-delivery.

ROSEMOND G. BLAKELOCK #6183
Attorney for Petitioner
305 East 300 South
Provo, Utah 84606
Telephone: (801) 375-7678
Facsimile: (801) 375-0704

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON (Bodell),	*	ORDER, IN RE: JANUARY 23, 2006 HEARING
Petitioner,	*	
v.	*	
NELDON PAUL JOHNSON,	*	
Respondent.	*	Case No. 004401468 Judge Fred Howard

This matter came on before the Court on January 23, 2006 before Judge Fred Howard. Present was the Petitioner and her counsel, Rosemond Blakelock

The Respondent was also present and represented by counsel, Denver Snuffer. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER

1. Pursuant to the stipulation of the parties the Petitioner is hereby granted a judgment in the amount of $223,982.97 as for past due amounts due and owing by Respondent to the Petitioner through January 31, 2006.

2. The Court shall conduct a Supplemental Proceeding on March 13, 2006 at the hour of 9:00 a.m. Both parties and their counsel are directed to appear at that date and time and be prepared to proceed.

3. The issue of the "one action rule" was raised by the Respondent and the court held that the one-action rule did not apply to the proceedings held on January 23, 2006.

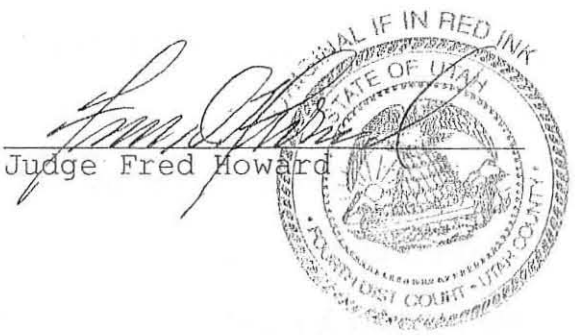
4. The Respondent raised the issue of whether or not the court may conduct contempt proceedings in this matter, regarding the Petitioner's request that the Respondent be held in contempt, as requested by Petitioner. The Petitioner's counsel shall submit a short memorandum on that issue. Therefore, at this time the issue of contempt is reserved for such further proceedings as are deemed necessary and proper by the Court and such hearings as may be consistent with the Court's rulings.

5. The Petitioner shall be granted a judgment as for attorney's fees in preparing for and attending the hearing of January 23, 2006, in the amount of $ 5,142.50 .

6. Petitioner's counsel shall submit an Affidavit of Attorney's fees and costs and the court shall enter a judgement accordingly.

SIGNED AND DATED this 27 day of February, 2006.

BY THE COURT:



Judge Fred Howard

NOTICE TO COUNSEL, Denver Snuffer

TO: Denver Snuffer
10885 South State Street
Sandy Utah 84070

You will please take notice that he undersigned attorney for Petitioner will submit the above and foregoing Order to the Court for signature. Pursuant to Rule 7 (f)(2) of the Utah Rules of Civil Procedure any objection as to the form of the order should be filed with the Court, within five days after service upon you of this notice.

DATED this 7 day of February, 2006.

ROSEMOND G. BLAKELOCK
Attorney for Petitioner

CERTIFICATE OF MAILING

On this 7th day of February 2006, I mailed a copy of the Order to Denver Snuffer at the above listed address, via first class mail.

ROSEMOND G. BLAKELOCK #6183
Attorney for Petitioner
305 East 300 South
Provo, Utah 84606
Telephone: (801) 375-7678
Facsimile: (801) 375-0704

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

125 North 100 West, Provo, Utah 84601

INA MARIE JOHNSON (Bodell),	*	VERIFIED NOTICE OF RESPONDENT'S WILLFUL REFUSAL TO SIGN TRUST DEED NOTE AS REQUIRED IN THE COURT'S RULING DATED FEBRUARY 23, 2006 AND VERIFIED MOTION FOR ORDER OF CONTEMPT
Petitioner,	*	
v.	*	
NELDON PAUL JOHNSON,	*	Case No. 004401468
Respondent.	*	

The Petitioner by and through her attorney of record hereby gives the Court Notice that the Court on February 23, 2006 the Court ordered and directed the Respondent as follows: (see attached Ruling) "The Court Hereby orders Respondent to sign the newly prepared trust deed note and trust deed and return them to Petitioner's counsel within ten (10) days of the date of this Ruling and Order".

Neither the Petitioner nor her counsel have received the signed trust deed note as ordered by the Court and at this time 20 days have passed - 10 DAYS LONGER THAN ALLOWED BY THE COURT.

The Respondent has previously stated in open court that he will never sign the document.

The Respondent has now willfully refused to sign the trust deed note as ordered by Judge Howard and as previously ordered by Judge Laycock in 2003.

It has been nearly three years since the Respondent began to disobey the Court.

The Court should impose sanctions and a jail sentence on the Respondent for his willful refusal to sign the Trust Deed Note.

SIGNED AND DATED this 13 day of March 2006.

Rosemond Blakelock
Attorney at law

Ina Bodell

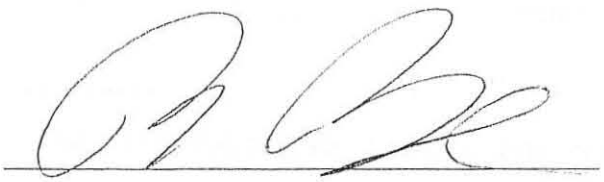
EMILY B. ROWLEY
NOTARY PUBLIC - STATE of UTAH
45 SOUTH 300 WEST
PROVO, UTAH 84601
COMM. EXPIRES 10-6-2008

NOTARY

1606

CERTIFICATE OF MAILING

On this 13th day of March 2006 a copy of the foregoing was sent to Denver Snuffer via first class mail at 10885 South State Street Sandy Utah 84070.



APPENDIX D

PARTIAL TRANSCRIPTS OF JULY 28, 2003 HEARING

Pages 44 through 49 of the transcript

IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT

UTAH COUNTY, STATE OF UTAH

INA MARIE JOHNSON, Petitioner, vs. NELDON PAUL JOHNSON, Respondent.	MOTIONS, ARGUMENT Case 004401468 Appeal 20040011-CA Judge Claudia Laycock

BE IT REMEMBERED that this matter came on for hearing before the above-named court on July 28, 2003.

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

CERTIFIED TRANSCRIPT

(From Electronic Recording)

ORIGINAL

PENNY C. ABBOTT, REPORTER-TRANSCRIBER
LIC. 102811-7801
PHONE: (801) 423-6463 EMAIL: pennyabbott@earthlink.net

THE JUDGE: All right.

MR. JACKMAN: It's not an issue of let's say well okay, we didn't do too good on this one, we want another bite of the apple. That's not what we're here for.

THE JUDGE: I understand, I understand. All right. Then with respect to the respondent's objection to the trust deed and the trust deed note I do confirm Commissioner Patton's finding that the one paragraph is offensive as submitted by respondent. And I'm referring to the paragraph that reads,

> "If the maker fails to pay any payment provided by this note"...

And I'm sorry. Let me be clear. This is out of respondent's trust deed documents.

> "If the maker fails to pay any payment provided by this note when due, the exclusive remedy of the holder of the trust deed and this note shall be the foreclosure of the trust deed, and the holder shall not be entitled to recover from the maker any deficiency under this note."

And I do agree with him that such a document was an attempt to thwart prior orders of the court. I have made specific orders and there have been orders to show cause in

front of me regarding the payment of the 8333 per month, and we had spent a great deal of time on that issue in this courtroom. And I do find that the language included by respondent was an effort to circumvent the order of the court and to deprive the petitioner of that amount which was awarded to her in the amended decree. It would have cut off her ability to collect that amount.

That leads us to where we go from here as to trust notes, trust deed notes and trust deeds. The commissioner held the respondent in contempt, and I think that actually is going to go, I'm not going to make a ruling on that at this time because I think that goes to another part of the hearing we're going to have today.

But I do agree and find as the commissioner did that the petitioner is not bound by the trust deed note and the trust deed prepared by the respondent. And I do agree with him that the responsible move for the court at that point was to have the petitioner prepare her own trust deed and trust deed note, which was done and was presented to counsel for the respondent.

Now, that leads us to today. I have before me a trust deed note and a trust deed that were prepared by the petitioner. And as I read the file it was the deed of trust note that was objected to.

I do find that paragraph three does not accurately

reflect the amended decree. Granted, the amended decree does not lay out every provision that should be included in the trust deed and the trust deed note. It would be unrealistic of the court to expect that the amended decree would. It is standard procedure in this court and in, I think in the other, with the other judges in this building and in this district, that very often included in the decree and the findings and conclusions that go with the decree, one or more of the parties are ordered to take care of certain documents to transfer property and to secure property. And it would have been very unlikely that the parties who came to court and finally achieved some sort of a stipulation in this matter would have had those documents prepared at that time so that they could have even been included as an attachment to the decree.

So it leaves the Court with the general outline found on page five of the decree as to how the documents, or what terms the documents should include. It would be the expectation of this Court that there would be standard provisions found in many trust deeds and trust deed notes that would be included by the parties.

My concern in looking at this is that where paragraph D on page five was stricken by the parties it indicates to me a willingness or an agreement of the parties to leave the issue of untimely payments to be resolved by the

court on an order to show cause basis. The paragraph that was stricken reads:

"In the event payment is not timely made the entire balance shall become immediately due and payable.".

Certainly there is nowhere, or there should be nowhere in the trust deed note an acceleration clause, or I think that Mr. Jackman called it an avalanche clause. And I find nothing else there that awards anything, added interest or added money of any kind for late payments. And I find that those should be taken care of as evidenced by this page of the amended decree by orders to show cause.

And so with regard to the deed of trust note that was prepared by the petitioner, I find that paragraph three, which deals with a late payment premium of 10% should be stricken, and I do so strike it from the document.

And paragraph four,.

"The holder of this note may declare the entire unpaid principle, unpaid amount of principle and interest due"...

should also be stricken, because neither of those paragraphs complies with page five of the amended decree.

As to paragraph five I will, based on the amended decree, strike the words,.

"upon 10 days prior written notice to

payee".

If the respondent can come up with the money to pay the indebtedness on any given day he can pay it according to the decree, and I will allow him to do so. I think it would bring a lot of peace to everybody if he could, but I don't think it's ever going to happen.

As to paragraph six, counsel for the respondent objects to this I think basically just to be objecting because it's not consistent with the decree. He has that right. But frankly, Mr. Woolley, it bothers me. This benefits your client and I think it's just somewhat extreporous, and so I'm going to leave it in. I see it as a benefit to your client. It allows him, if she will consent, to make late payments. I don't think that's going to happen based on the history of the parties before me. But that would be her, her prerogative. And it's more than he's going to otherwise have. It's a benefit to him. And if she wants to give him that I just don't know why on earth he would want to refuse that benefit. So I'm going to leave it in.

There was no objection made in writing to the trust deed itself, and no objection made today until after I'd asked the question twice.

And so with that, with those changes I am going to instruct Mr. Jackman or Ms. Blakelock, whoever wants to do

it, to prepare a corrected copy of the trust deed note, send both documents to Mr. Woolley to have his client sign.

MR. JOHNSON: I won't sign it.

THE JUDGE: That's your decision, sir. And I would suggest that you let your attorney do the talking for you. It will be a lot better for you in the short and the long-run.

How soon do you think you can get that done?

MS. BLAKELOCK: Oh, we can get it done, we've already got the document on the computer. I can have it over to Mr. Woolley probably by this afternoon.

THE JUDGE: Okay. I would like that done. Today is Monday. I want it signed and returned to Ms. Blakelock within 72 hours working days, within three working days of the receipt by Mr. Woolley at his office.

Just a word to the wise. Failure to sign this will upon the proper hearing most likely be considered contempt of the court. It's time to get this off our list of issues and move on.

MR. JACKMAN: May I be excused, Your Honor? I have to go to another hearing.

THE JUDGE: Fine. Thank you.

Moving on, I would like to next deal with the respondent's motion to set aside the amended decree of divorce. Mr. Woolley?

APPENDIX E
Relevant Statutes and Rules

Utah Code Ann. § 30-3-5(3)
Utah Code Ann. § 78-2a-3(2)(h)
Rule 4(b) of the Utah Rules of Appellate Procedure
Rule 33 of the Utah Rules of Appellate Procedure
Rule 34 of the Utah Rules of Appellate Procedure
Rule 24(a)(9) of the Utah Rules of Appellate Procedure

tion to dismiss appeal for failure of appellant to pay filing fee within 30 days after receipt of record by district court clerk. U.C.A.1943, 104-77-9. Penman v. Eimco Corp., 1948, 114 Utah 16, 196 P.2d 984. Appeal And Error ⇐ 370

An appeal from the commissioner's court to the district court is properly dismissed, where appellant fails to pay the docket and jury fee within 30 days after the receipt of the appeal papers in the district court, as required by a rule of court; and the fact that the last of the 30 days is a Sunday, and that the next is a holiday, is no ground for refusing to dismiss, where appellant did not make payment the following day. Van Wagoner v. Barben, 1894, 9 Utah 481, 35 P. 497. Appeal And Error ⇐ 370

RULE 4. APPEAL AS OF RIGHT: WHEN TAKEN

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion is filed in the trial court (1) for a new trial under Rule 24 of the Utah Rules of Criminal Procedure,; or (2) to withdraw a plea under Utah Code Ann. § 77–13–6, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying the motion to withdraw the plea. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to

the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) **Appeal by an Inmate Confined in an Institution.** If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14–day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

[Amended effective November 1, 1998; April 1, 1999; November 1, 2002.]

Cross References

Notice of appeal, see Rules App. Proc., Form 1.

Library References

Appeal and Error ⇐428(2).
Criminal Law ⇐1081(4).
Forcible Entry and Detainer ⇐43(4).
Westlaw Key Number Searches: 30k428(2); 179k43(4); 110k1081(4).

C.J.S. Appeal and Error §§ 270, 274 to 282, 290, 295 to 297, 314, 381.
C.J.S. Criminal Law §§ 1685 to 1686.

United States Supreme Court

Appeal by state,
Suppression of evidence, government's right to appeal, double jeopardy, certiorari, see United States v. Morrison, U.S.1976, 97 S.Ct. 24, 429 U.S. 1, 50 L.Ed.2d 1; United States v. Rose, U.S. 1976, 97 S.Ct. 26, 429 U.S. 5, 50 L.Ed.2d 5.

Appeals in criminal actions,
In general,
Certificate of probable cause to appeal, effectiveness of counsel, presumption of prejudice, habeas petition, see Burden v. Zant, U.S.Ga.1991, 111 S.Ct. 862, 498 U.S. 433, 112 L.Ed.2d 962, on remand 975 F.2d 771.
Habeas petitions, dismissal of exhausted and unexhausted claims, dismissal of refiled petitions as time-barred, duty of court to advise pro se litigants of stay-and-abeyance procedure, see Pliler v. Ford, U.S.Cal.2004, 124 S.Ct. 2441.
Right to appeal in two-tier trial system, see Costarelli v. Massachusetts, U.S.Mass.1975, 95 S.Ct. 1534, 421 U.S. 193, 44 L.Ed.2d 76.
Right to appeal sentence, failure to advise of right, knowledge of right, prejudice, habeas corpus or collateral relief, see Peguero v. U.S., U.S.Pa.1999, 119 S.Ct. 961, 143 L.Ed.2d 18.
Standing,
Standing to challenge death penalty imposed on fellow death row inmate, see Whitmore v. Arkansas, U.S.Ark.1990, 110 S.Ct. 1717, 495 U.S. 149, 109 L.Ed.2d 135.
Substitution of charges
Substitution of felony charges, appeal of misdemeanor violations, see Thigpen v. Roberts, U.S.Miss.1984, 104 S.Ct. 2916, 468 U.S. 27, 82 L.Ed.2d 23.

Appellate jurisdiction,
In general,
Adoption, jurisdiction of Supreme Court, review of state court's interpretation of state law, due process, see O'Connell v. Kirchner, U.S.Ill.1995, 115 S.Ct. 891, 513 U.S. 1303, 130 L.Ed.2d 873.
Civil contempt order, nonparty witnesses, right to appeal lack of subject matter jurisdiction, final judgment, see U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., U.S.N.Y.1988, 108 S.Ct. 2268, 487 U.S. 72, 101 L.Ed.2d 69, on remand 885 F.2d 1020.
Granting of demurrer as acquittal, appeal by state barred, see Smalis v. Pennsyl-

diminished capacity to murder charge to determine substance of excluded psychiatric expert's testimony so as to decide whether defendant was prejudiced by absence of expert's testimony at trial; missing information consisting of testimony of single intended witness made it more sensible for Court of Appeals to make limited remand rather than requiring defendant to seek relief on claims for postconviction or habeas corpus proceedings. U.C.A.1953, 77-14-3; Rules App.Proc., Rule 23B; U.S.C.A. Const. Amend. 6. State v. Cummins, 1992, 839 P.2d 848, certiorari denied 853 P.2d 897. Criminal Law ⇦ 1181.5(6)

9. Appellate proceedings following remand

In ruling on an ineffective assistance claim following a hearing on a motion to remand for findings necessary for a determination of an ineffective assistance of counsel claim, the Court of Appeals defers to the trial court's findings of fact, but review its legal conclusions for correctness. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B. State v. Mecham, 2000, 9 P.3d 777, 402 Utah Adv. Rep. 12, 2000 UT App 247. Criminal Law ⇦ 1158(1)

Appellate court would defer to trial court's findings of fact on temporary remand, regarding defendant's claim of ineffective assistance of trial counsel. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B. State v. Maestas, 2000, 997 P.2d 314, 388 Utah Adv. Rep. 35, 2000 UT App 22, certiorari denied 4 P.3d 1289. Criminal Law ⇦ 1158(1)

Supreme Court defers to the trial court's findings of fact following remand for evidentiary hearing on claim of conflict of interest with counsel, but treats issue as a question of law. Rules App.Proc., Rule 23B. State v. Lovell, 1999, 984 P.2d 382, 368 Utah Adv. Rep. 3, 1999 UT 40, rehearing denied, certiorari denied 120 S.Ct. 806, 528 U.S. 1083, 145 L.Ed.2d 679. Criminal Law ⇦ 1134(3); Criminal Law ⇦ 1158(1)

Court of Appeals defers to factual finding made by trial court on remand for evidentiar hearing on ineffective assistance of counse claim and does not consider new evidence Rules App.Proc., Rule 23B(b). State v. Bredehoft, 1998, 966 P.2d 285, 353 Utah Adv. Rep. 3 certiorari denied 982 P.2d 88. Criminal Law ⇦ 1128(4); Criminal Law ⇦ 1158(1)

Supreme Court defers to trial court's findings of fact after hearing on ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B. State v. Taylor, 1997, 947 P.2d 681, 328 Utah Adv. Rep. 23, certiorari denied 119 S.Ct. 89, 525 U.S. 833, 142 L.Ed.2d 70. Criminal Law ⇦ 1158(1)

If trial court has held hearing and made specific findings relevant to ineffective assistance of counsel claim, Court of Appeals defers to trial court's findings of fact, then applies appropriate legal principles to facts and decides, for first time on appeal, whether defendant received ineffective assistance. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B. State v. Huggins, 1996, 920 P.2d 1195, certiorari denied 929 P.2d 350. Criminal Law ⇦ 1158(1)

10. Presumptions and burden of proof

Because defendant failed to provide Court of Appeals with transcript from hearing on motion to remand for findings necessary to determination of ineffective assistance of counsel, the Court would presume that the trial court's findings were supported by competent and sufficient evidence; therefore, the Court's review was strictly limited to whether the trial court's findings of fact supported its conclusions of law and judgment. Rules App.Proc., Rules 11(e)(2), 23B. State v. Simmons, 2000, 5 P.3d 1228, 398 Utah Adv. Rep. 7, 2000 UT App 190. Criminal Law ⇦ 1144.13(8)

RULE 24. BRIEFS

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings

of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in

of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in

length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(h) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(j) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

[Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004.]

Advisory Committee Note

Rule 24 (a)(9) now reflects what Utah appellate courts have long held. *See In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty . . ., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052–53 (Utah App. 1994) (alteration in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315

Notes of Decisions

Publication 1

1. Publication
Opinion that established new rule of Utah law and opinion that dealt with dicta in another case which appeared to be flatly contrary to new rule of law should have been published. Rules App.Proc., Rule 31. State v. Gardiner, 1991, 814 P.2d 568. Courts ⇐ 103

RULE 32. INTEREST ON JUDGMENT

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court.

Library References

Interest ⇐39(2).
Westlaw Key Number Search: 219k39(2).

C.J.S. Interest and Usury; Consumer Credit §§ 42, 49 to 51.

RULE 33. DAMAGES FOR DELAY OR FRIVOLOUS APPEAL; RECOVERY OF ATTORNEY'S FEES

(a) Damages for Delay or Frivolous Appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Advisory Committee Note

Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages—single or double costs or attorney fees or both—is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 U.S. 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

Library References

Costs ⇐259.
Westlaw Key Number Search: 102k259.
C.J.S. Costs §§ 183 to 187, 189 to 191.

Notes of Decisions

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1. In general

Award of attorney fees to landlord for landlord's unsuccessful certification of nonfinal judgment against tenant and for tenant's subsequent appeal of improperly certified judgment was unreasonable; improper certification left tenant with no reasonable option but to appeal summary judgment motion to avoid execution proceedings and award of attorney fees on appeal was prerogative of appellate court, not trial court. Rules Civ.Proc., Rule 54(b). TS 1 Partnership v. Allred, 1994, 877 P.2d 156. Costs ⇐ 252; Costs ⇐ 260(5)

Sanctions for frivolous appeals should only be applied in egregious cases, lest there be improper chilling of right to appeal erroneous lower court decisions. Rules App.Proc., Rule 33(a). Matter of Estate of Hamilton, 1994, 869 P.2d 971, certiorari denied 879 P.2d 266. Costs ⇐ 260(1)

Sanctions for frivolous appeal are applied only in egregious cases, lest there be improper chilling of right to appeal erroneous lower court decisions. Rules App.Proc., Rule 33. Farrell v. Porter, 1992, 830 P.2d 299. Costs ⇐ 260(1)

Sanctions for frivolous appeals should only be applied in egregious cases, lest there be improper chilling of right to appeal erroneous trial court decisions, but sanctions should be imposed when appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing and results in delayed implementation of judgment of lower court, increased costs of litigation and dissipation of time and resources. Court of Appeals Rules 33(a), 40(a). Porco v. Porco, 1988, 752 P.2d 365. Costs ⇐ 260(1)

2. Frivolous appeal

Landowners' appeal of decision that road was public rather than private was not frivolous, and thus county was not entitled to attorney fees on appeal. Rules App.Proc., Rule 33(b). Chapman v. Uintah County, 2003, 81 P.3d 761, 486 Utah Adv. Rep. 45, 2003 UT App 383, certiorari denied 90 P.3d 1041. Counties ⇐ 228

Judgment creditor's appeal was frivolous, as basis for awarding attorney fees to defendant corporation and corporate officer, after trial court dismissed, for failure to state a claim, creditor's causes of action for conversion, misappropriation of corporate opportunity, and fraudulent transfer, relating to officer's purchase, from bankruptcy trustee in corporation's bankruptcy case, of corporation's potential

P.3d 543, 428 Utah Adv. Rep. 21, 2001 UT 75. Appeal And Error ⇐ 1097(1)

15. Mootness

County clerk's unsuccessful appeal from trial court judgment that clerk, who was seeking reelection, could not place her "official endorsement" on every page of ballot booklet was not frivolous so as to entitle opposing candidate, who prevailed in trial court, to appellate attorney fees; case was appropriate for appellate review despite technical mootness of issues, and clerk brought appeal in good faith, requesting reversal of trial court and guidance to election officials in properly interpreting applicable statutes. U.C.A.1953, 20A–6–301, 20A–6–303; Rules App.Proc., Rule 33. Ellis v. Swensen, 2000, 16 P.3d 1233, 411 Utah Adv. Rep. 13, 2000 UT 101. Elections ⇐ 179

16. Amount of costs and fees

Ten per cent. damages awarded to defendant in error, under Sup.Ct. Rule 23, cl. 2, 28 U.S.C.A. foll. § 354, Rule 28, on the ground that the errors assigned were frivolous, and the writ was taken merely for delay. Nelson v. Flint, 1897, 17 S.Ct. 576, 166 U.S. 276, 41 L.Ed. 1002. Costs ⇐ 260(4)

Pro se litigant's frivolous petition for extraordinary relief, requesting an order directing trial court to allow her to intervene as a matter of right in underlying collections action, entitled real parties in interest to attorney fees and double costs for defending such petition. Rules App.Proc., Rule 33(c)(1); Rules Civ.Proc., Rule 65B(a). Lundahl v. Quinn, 2003, 67 P.3d 1000, 470 Utah Adv. Rep. 28, 2003 UT 11, rehearing denied. Costs ⇐ 66; Costs ⇐ 194.44

Appellees were entitled to single costs and reasonable attorney fees based on appellant's frivolous appeal of determination that notary's alleged false notarization of trust deed did not cause appellees to lose their home through foreclosure where appeal was not accompanied by any legal argument showing how notarization caused loss of home or by any good faith argument to extend, modify or reverse existing law. Rules App.Proc., Rule 33. Larson v. Overland Thrift and Loan, 1991, 818 P.2d 1316, certiorari denied 832 P.2d 476. Costs ⇐ 260(5)

Attorney fees and/or double costs are awarded in cases of frivolous appeal. Erickson v. Wasatch Manor, Inc., 1990, 802 P.2d 1323. Costs ⇐ 260(1)

Ex-wife's appeal of trial court's division of property and termination of temporary alimony was frivolous, and thus ex-husband was entitled to twice the costs incurred on appeal; wife failed to support her arguments that improvements to her home by her then husband-to-be and furniture bought by her then husband-to-be had become the wife's separate property, and wife failed to marshal evidence showing that trial court's termination of temporary alimony due to her cohabitation with another man was clearly erroneous. Rules App.Proc., Rules 33(a, b), 34. Barber v. Barber, 1990, 792 P.2d 134. Costs ⇐ 260(5); Costs ⇐ 263

Where there was no legal or factual basis for town's contentions regarding sewage treatment agreement either in trial court or on appeal, and record indicated deliberate course of conduct designed to frustrate purposes of party's agreement, city was entitled to award of reasonable attorney fees and double costs on appeal. Court of Appeals Rules 33(a), 40(a). Brigham City v. Mantua Town, 1988, 754 P.2d 1230. Costs ⇐ 260(5)

17. Appeals without merit

The sanction for filing a frivolous appeal applies only in egregious cases with no reasonable legal or factual basis. Rules App.Proc., Rule 33(a). Cooke v. Cooke, 2001, 22 P.3d 1249, 418 Utah Adv. Rep. 24, 2001 UT App 110. Costs ⇐ 260(4)

Sanctions are appropriate for appeals obviously without merit, with no reasonable likelihood of success, and which result in delay of proper judgment. Rules App.Proc., Rule 33. Farrell v. Porter, 1992, 830 P.2d 299. Costs ⇐ 260(1)

In appeal from trial court's vacation of judgment based on forum state's lack of in personam jurisdiction over defendants, attorney fees were not awarded, even though appeal was without merit, where appeal was not frivolous or brought for purpose of delay. Sup.Ct.Rules, Rule 33(a). Bradford v. Nagle, 1988, 763 P.2d 791. Costs ⇐ 260(5)

Although bank's claims of error on appeal from judgment finding that creditor which had perfected security interest pursuant to "flooring" arrangement with automobile dealer had priority were without merit, bank did not appeal in bad faith and, therefore, creditor was not entitled to attorney fees. U.C.A.1953, 78–27–56. Draper Bank and Trust Co. v. Lawson, 1983, 675 P.2d 1174. Costs ⇐ 260(5)

RULE 34. AWARD OF COSTS

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs

shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) Costs for and Against the State of Utah. In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) Costs of Briefs and Attachments, Record, Bonds and Other Expenses on Appeal. The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed $3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) Bill of Costs Taxed After Remittitur. A party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the trial court upon the request of either party made within 5 days of the entry of the judgment.

(e) Costs in Other Proceedings and Agency Appeals. In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party.

The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

[Amended effective November 1, 1999.]

Library References

Costs ⇐239, 240, 253 to 258, 264.
Westlaw Key Number Searches: 102k239; 102k240; 102k253 to 102k258; 102k264.

C.J.S. Costs §§ 167, 172 to 174, 176 to 178.

Notes of Decisions

1. In general

Attorney fees on appeal are only granted when authorized by statute or rule of court. Christensen v. Abbott, 1983, 671 P.2d 121. Costs ⇐ 252

2. Power to award fees

Court of Appeals may order either party to pay attorney fees and this includes fees incurred on appeal. U.C.A.1953, 30-3-3. Bagshaw v. Bagshaw, 1990, 788 P.2d 1057. Costs ⇐ 252

3. Discretion of court

Attorneys' fees on appeal are discretionary with the Supreme Court. Swain v. Salt Lake Real Estate & Inv. Co., 1955, 3 Utah 2d 121, 279 P.2d 709. Costs ⇐ 252

4. Contracts

Lender who prevailed both at trial and on appeal, in action against borrower to enforce contract that included a provision for payment of attorney fees, was entitled to attorney fees incurred on appeal, where lender also received attorney fees below. Covey v. Covey, 2003, 80 P.3d 553, 486 Utah Adv. Rep. 11, 2003 UT App 380, certiorari denied 90 P.3d 1041. Costs ⇐ 252

A provision for payment of attorney fees in a contract includes attorney fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract. Covey v. Covey, 2003, 80 P.3d 553, 486 Utah Adv. Rep. 11, 2003 UT App 380, certiorari denied 90 P.3d 1041. Costs ⇐ 252

Listing contract signed by vendor and real estate agent, entitling the prevailing party to award of attorney fees "[i]n any action ... arising out of" the contract, entitled the vendor to an award of attorney fees, after she prevailed on appeal in her action against agent and agent's employer for breach of contract and other claims. Bearden v. Wardley Corp., 2003, 72 P.3d 144, 474 Utah Adv. Rep. 40, 2003 UT App 171. Costs ⇐ 252

Landlords were entitled to recover reasonable attorney fees on appeal, where their leases provided that nonprevailing parties would be reimburse "fees, costs or disbursements incurred on any appeal" from action or proceeding relating to the provisions of lease. Keith Jorgensen's, Inc. v. Ogden City Mall Co., 2001, 26 P.3d 872, 419 Utah Adv. Rep. 26, 2001 UT App 128. Costs ⇐ 252

Court of Appeals routinely allows attorney fees on appeal when contracts expressly provide

§ 30-3-5. Disposition of property—Maintenance and health care of parties and children—Division of debts—Court to have continuing jurisdiction—Custody and parent-time—Determination of alimony—Nonmeritorious petition for modification

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5)(a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace

vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings. 2001

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1988

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1988

78-2a-6. Appellate Mediation Office — Protected records and information — Governmental immunity.

(1) Unless a more restrictive rule of court is adopted pursuant to Subsection 63-2-201(3)(b), information and records relating to any matter on appeal received or generated by the Chief Appellate Mediator or other staff of the Appellate Mediation Office as a result of any party's participation or lack of participation in the settlement program shall be maintained as protected records pursuant to Subsections 63-2-304(16), (17), (18), and (33).

(2) In addition to the access restrictions on protected records provided in Section 63-2-202, the information and records may not be disclosed to judges, staff, or employees of any court of this state.

(3) The Chief Appellate Mediator may disclose statistical and other demographic information as may be necessary and useful to report on the status and to allow supervision and oversight of the Appellate Mediation Office.

(4) When acting as mediators, the Chief Appellate Mediator and other professional staff of the Appellate Mediation Office shall be immune from liability pursuant to Title 63, Chapter 30d, Governmental Immunity Act of Utah.

(5) Pursuant to Utah Constitution, Article VIII, Section 4, the Supreme Court may exercise overall supervision of the Appellate Mediation Office as part of the appellate process. 2005

CHAPTER 3

DISTRICT COURTS

Section